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The purpose of this monograph was to examine the nature of changes in the system of rights and obligations surrounding employment and the relationship of employer to employee in the United States, Britain, France, and Mexico, with particular emphasis on the property-like rights in employment. In the United States there have been three stages in the objectification of the concept of a job: (1) the period in which the employer-employee relationship was generally conceived as personal, independent of any other such relationship, and characterized by contractual concepts of mutuality and reciprocity, (2) a period in which access to jobs lay under sole control of the employer, and (3) the present period, in which the employer-employee relationship is not linear but complex, and in which both employer and employee have an independent relationship to the job and to families of jobs. "Conflict over the Right to Work in Britain," "France: the Primary Role of Law," and "Job Security in Mexico" compare similar developments in these respective countries. The evidence from these four countries tends to support the conclusion that the classic liberal contractual approach to the employment relation in a complex industrial society is not a viabl e one. (EM)

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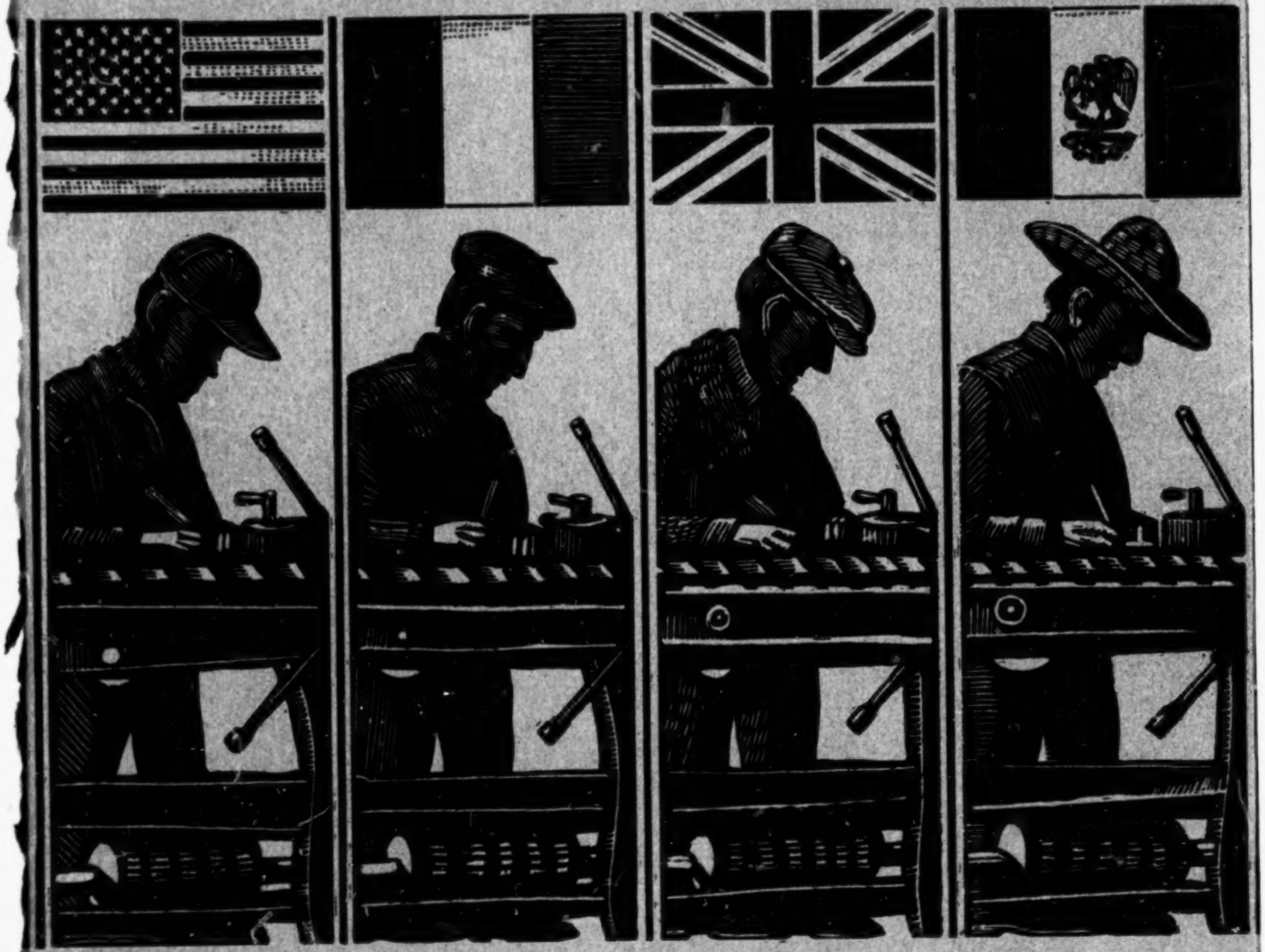

OWNERSHIP OF JOBS:

A COMPARATIVE STUDY

by Frederic Meyers

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Institute of Industrial Relations • University of California, Los Angeles

OWNERSHIP OF JOBS:
A Comparative Study

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Foreword

The Institute of Industrial Relations is pleased to offer *Ownership of Jobs: A Comparative Study* as the eleventh in its Monograph Series. Its author, Frederic Meyers, is Professor of Business Administration and Associate Director, Community Services, of the Institute of Industrial Relations at the University of California, Los Angeles.

The Institute reading committee for the manuscript consisted of Professor Derek Bok of the Harvard Law School, Joseph R. Grodin, Esq., of Neyhart & Grodin, San Francisco, and the undersigned. Mrs. Anne P. Cook edited the manuscript. The cover was designed by Marvin Rubin.

The viewpoint expressed is that of the author and is not necessarily that of the Institute of Industrial Relations or of the University of California.

BENJAMIN AARON, *Director*
Institute of Industrial Relations
University of California, Los Angeles

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It will be immediately apparent that this study could not have been made without considerable assistance, financial and intellectual. I am deeply indebted to the Guggenheim Foundation for the honor and privilege of a Fellowship in 1960 which permitted me to work free of other responsibilities in Europe. This grant was supplemented by one from the Trade Union Project of the Fund for the Republic. Further financial assistance came from the Research Division of the Graduate School of Business Administration and from the Institute of Industrial Relations, University of California, Los Angeles.

So many people gave of their time and knowledge in each of the several countries studied that it is impossible to name all, and it would be unfair to name only some. But I would like to express my deep gratitude to the institutions whose staff were of such great help. The London School of Economics made me welcome in England, the Institut des Sciences Sociales du Travail in Paris, and the Instituto de Derecho Comparado in Mexico. The staff of the International Labor Organization in Geneva helped with much basic information. Though the studies published in the *International Labor Review* and certain working documents, leading up to a proposed Convention on Dismissal Procedures, are not specifically footnoted, those who worked on this project were most helpful, and the studies themselves provided many valuable leads and ideas.

Anne Cook edited the manuscript, as has happened before, under difficult circumstances. Once again, I am deeply in her debt.

FREDERIC MEYERS

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Chapter 1

Introduction: The United States

The phrase "property right in a job" has come into increasing currency in recent years, not only in the United States but in other countries as well.[1] It is, of course, used loosely, as an analogy to more traditional rights of property rather than as a category of them. Nevertheless, it implies a change in the system of rights and obligations surrounding employment and the relationship of employer to employee. The purpose of this monograph is to examine the nature of this change in three foreign countries and the United States. How apt is the analogy to property, how universal is the change, how similar are its directions, how closely is it bound to particular institutions, especially of law and of collective bargaining? In sum, is there an inherent instability in the traditional contractual relationship between employer and employee which causes it to yield over time to something different, and, if so, are there common characteristics in the new forms of relationship? These are the broad questions on which this study seeks relevant evidence.

The questions are, of course, so general that only a far larger work than this could provide general answers. But in selecting more specific questions and particular countries, I have tried, within the bounds of practicality, to find useful clues for drawing at least tentative conclusions.

To the layman at least, one of the essential characteristics of property is the right to retain undisturbed possession. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."[2] If employment is property, or analogous thereto, undisturbed possession means the right to continue in employment at the will of the employee. Protection against involuntary dismissal is a crucial characteristic to be sought if a system may be said to have property-like rights in employment. It is on this point that this inquiry centers. We shall examine the rights of employees threatened with dismissal either individually or in connection with reductions in force.

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[1] See, for example, the Introduction and discussion by Paul Durand in a series of essays on job security in the countries of the Coal and Steel Community: G. Boldt *et al.*, *La Stabilité de l'Emploi dans le Droit des Pays Membres de la C.E.C.A.* (Luxembourg: Communauté Européenne du Charbon et de l'Acier, 1958), pp. 53, 193.

[2] Fifth Amendment to the Constitution of the United States.

The transformation that Western and Western-influenced industrial and legal systems worked on their predecessors has been described as a change "from status to contract." Without here examining what was meant by status relationships in employment, the extension of the notion of contract implied, first, that all rights and obligations were reciprocal and mutual, and, second, that the totality of these rights and obligations comprised those to which the parties mutually contracted. A man was no longer born to labor at the tasks and for the person determined by the circumstances of his birth. Rather he sought a buyer for tasks he wished to perform, just as the buyer sought a seller of the services he desired. Once met, buyer and seller of labor contracted freely as to the terms of performance.

There were, however, certain common characteristics of these contracts. Usually they were for either limited or indefinite term.[3] Contracts of indefinite term could be terminated upon the giving of such notice as was provided by the contract, or without notice, as the case might be. But, consistent with the general concept of contracts, the notice obligations were reciprocal and equal, and breach gave the option of rescission to the party whose contractual rights had not been respected.

Common notions of liberty imposed a special condition on a particular class of contracts—those to do or to act, and those not to do or not to act. In Anglo-Saxon law this condition was expressed in the common-law maxim that contracts of personal service cannot be enforced by specific performance. No one may be forced to work for another, nor may an employer be forced to continue an employee in his service, regardless of the contract terms. Only damages and/or rescission can result from breach of a contract of service.

This purely contractual concept of the relationship of employer to employee avoids the issue of undisturbed possession, since it embodies no concept of a job at all. The employer desires that service be done, and purchases from the employee the performance of that service. An expression, perhaps, of relations in an economy of artisanship and custom manufacture, the system has no concept of a post of employment which has a continued existence through numbers of incumbencies or vacancies. Such a concept awaited the development of large-scale industries and the rationalization of production.

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[3] But see F. R. Batt, *The Law of Master and Servant* (4th ed. by Vaines; London: Pitman, 1950), p. 51. In Britain, contracts for life appear to be valid. In France, however, the Civil Code has always provided that hire of services can only be for determinate time. (Article 1780.)

In both the United States and France, as we shall see, the railroads were the industry in which issues of employment security first developed. Here was a new industry in which old customs had not crystallized and, perhaps more significant, in which it was apparent that a job in an objective sense existed since the industry depended upon continued performance of related jobs. Later mass production could be regarded, in essence, as the specific definition of objective jobs in particular relationships to each other.

Certainly in the contemporary American industrial culture there is an objectification of the concept of a job. We talk about "my job" in a sense distinct from any formal relationship to an employer; the employer speaks about giving or creating jobs; we have systems of job analysis and job evaluation. We order jobs in systems of seniority, or job ladders, without consideration of particular incumbents, or indeed whether or not there are any. In the literature of production engineering and management, tasks are conceived of apart from jobs, and jobs may contain periods in which no tasks are performed.

A job, of course, is an abstraction, but like other abstractions such as "good will" and "expectancy of profit," it may become the object of "ownership." Acceptance of the idea of job ownership then raises the issue of the consequences of involuntary deprivation of "title."

It seems to me that in the United States we can describe three stages in the process: (1) the period before the objectification of the notion of a job, in which the employer-employee relationship was generally conceived of as personal, independent of any other such relationships, and characterized by contractual concepts of mutuality and reciprocity; (2) a period in which the concept of the job had become objectified but in which access to jobs lay under the sole control of the employer, who "created" them and maintained continuous control over their allocation among any and all desirous of incumbency; and (3) the present period in which in major segments of the economy the employer-employee relationship is no longer a linear one, but is a complex one in which both employer and employee have an independent relationship to a job and to families of jobs.

Because of the common legal and cultural antecedents of Britain and the United States, the first two stages in both countries will be discussed briefly in the next chapter dealing largely with Britain. In the United States, the transition to the third stage involves only the unionized segments of the economy. In the unorganized sectors, with a few exceptions, the characteristics of the second stage still prevail; the employer retains unilateral control, in general, over allocation of and incumbencies in jobs. So sharp are the distinctions between these two systems in the United States that, for purposes of employment tenure, they may almost be called two different worlds.

DISCIPLINARY DISMISSALS IN THE UNITED STATES

The growth of collective bargaining in the United States brought formal expression of the interest of employees in protection against arbitrary dismissal, and in the provision of orderly and predictable relations among equities in the event of diminution in the number of jobs. This interest appeared in the form of provisions of collective agreements requiring that employers show just cause before dismissing an employee for disciplinary reasons, and in the form of seniority clauses which required, within a seniority district collectively defined, that in the event of reduction in force employees be separated in accordance with length of service, either considered alone or weighted with other criteria such as skill and efficiency.

The enforceability of collectively negotiated clauses pertaining to security in employment long remained in the same sort of limbo as did the entire collective agreement itself.[4] For years the courts were unwilling to regard collective bargaining agreements as more than "treaties" enforceable only by the strength of the offended party; indeed, in Britain they remain gentlemen's agreements enforceable only as a moral obligation and by the exercise of private collective sanctions. So long as this was true, at law the employer retained the right to dismiss a worker with or without cause and, in the usual case of an industrial worker in the United States, without notice, despite any contrary provisions of a collective agreement.

Then, by one or another theory, the courts began to read into the individual contracts of service the terms of the collective agreement. For example, if the collective agreement contained a provision requiring layoffs in order of seniority, the individual employee was held to have an enforceable contractual right to continued employment so long as employees junior to him remained employed. This reading, of course, did not bar dismissal for good individual cause. But in certain early cases involving collective agreements without "just cause" provisions, the seniority clauses were held to be their equivalent, the court reasoning that seniority was a right to continued employment under the specified terms, of which the employee could not be deprived except for good cause,[5] that is, an act by the employee constituting breach of contract.

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[4] For a review of the legal status of collective agreements, see Charles O. Gregory, *Labor and the Law* (2d rev. ed.; New York: Norton, 1958), pp. 443 ff.

The remedy available to the employee remained in doubt, however. In earlier years it was commonly held that the only possible remedy was damages, since the common law forbade specific performance.[6] But by 1920[7] some courts had discovered that there was no adequate way to measure damages, and they enjoined such violations of the terms of collective agreements as might be read into the individual terms of employment. That the effect of such injunctions was to arrive at specific performance did not seem to concern these courts.[8]

As late as 1936, however, a court upheld the terminability at will of a contract of service despite a "just cause" provision in a collective agreement, on the old-fashioned contractual rule that the provision "lacked mutuality." "A different interpretation results in forcing an employer to continue an unsatisfactory employee although the grounds for his dissatisfaction might not amount to legal or just cause. Such an enforced relationship would most probably be a continuous source of agitation to the detriment of both parties, as well as to the service performed."[9]

Truly effective enforcement of the right to undisturbed possession of a job against the threat of unjustified disciplinary dismissal awaited the development of sophisticated grievance procedures and the widespread adoption of the practice of contractual arbitration of disputes arising out of the terms of a collective agreement.

In the earlier period, the legal status of contractual arbitration clauses was complicated not only by the doubtful enforceability of collective agreements in general, but also by the common-law doctrine that agreements to arbitrate future disputes could not be enforced. However, even before World War II, a number of states enacted statutes enabling their courts to enforce such agreements, usually provided certain procedural forms had been complied with.

The practice of grievance arbitration as a virtually universal part of the employer-union relationship came with World War II and the stimulus to voluntary arbitration of grievances resulting from War Labor Board policies. The Taft-Hartley Act of 1947 finally confirmed the enforceability of contractual arbitration clauses. Thus, there remains no doubt about the status both of those clauses of collective agreements which protect the worker against dismissal without good cause, and of those which enforce these and other provisions by recourse to arbitration.

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[5] See Note, 51 *Harvard Law Review* 522 (1958). At page 523 the author points out that all the cases involving enforcement of seniority rules were railroad cases.

[6] *Ibid.*

[7] See *Gregg v. Starks,* 188 Ky. 834, 224 S.W. 459 (1920).

[8] See Note, 51 *Harvard Law Review* 522 (1958). See also Myron Gollub, *Discharge for Cause,* New York State Mediation Board, Special Bull. no. 221 (1948), pp. 7–11. Here it is shown that reinstatement under "just cause" clauses was often sustained on the ground that the clause constituted a waiver of the common-law rule against specific performance.

[9] *Louisville & Nashville R.R. v. Bryant,* 263 Ky. 578, 92 S.W.2d 749 (1936).

There is no longer doubt about the authority of an arbitrator, acting under the usual "just cause for dismissal" and arbitration clauses of a contract, to direct reinstatement as the remedy for a dismissal in violation of the contract.[10] This, in fact, is the almost universally applied remedy. It is also well established that such an arbitration award is enforceable in the courts, like any other, irrespective of the common-law doctrine that contracts of personal service will not be specifically enforced.[11] Moreover, it is generally accepted under the "common law of arbitration" that in the application of "just cause" provisions, the burden of proving cause for dismissal rests on the employer.[12]

The net result of these practices is that in the world of collectively bargained relationships, the employer's control over possession of a job, leaving aside the right to decide on the continued existence of the job at all, is usually restricted to that which he may exercise at the point of initial access. Except in the strict closed-shop industries, the employer selects from among job applicants and, perhaps, retains the right within a contractually determined probation period to reverse this initial decision to hire. But, once established in a job, so long as that job exists the worker cannot be dismissed except for proven personal cause. Indeed, if the particular job ceases to exist, seniority clauses often give him an enforceable claim to one of the remaining jobs, though of course this is a relative claim since someone usually goes out the door.

It can realistically be said, then, that the typical worker covered by a collective agreement in the United States has a kind of life tenure in his job so long as it continues to exist. He cannot be dismissed, provided always that he wishes to exercise his rights,[13] unless and until he can be shown to be incompetent or to have abandoned his equity by improper conduct. The job is his, for his and its life, irrespective of the will of the employer. In this respect, in unionized industry, the traditional notion of the employment relationship as an individual contractual one, voluntarily entered into by each party and voluntarily terminable by either, has been completely abandoned.

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[10] An earlier view was that all the ordinary rules of contract, including, presumably, the restrictions on method of enforcement, applied: "It has been authoritatively stated that the entire proceedings of arbitration and award merely constitute a contract between the parties. At the time of submission they agree to do what shall be awarded; and when the award is made, it is read into the original agreement. In accordance with this view, at common law the successful party can enforce the award only in the same manner as he can enforce an ordinary contract. . . ." 3 *American Jurisprudence* 972.

[11] See decision of the California Supreme Court in *Levy v. Superior Court of Los Angeles County*, 15 Cal. 2d 692, 104 P.2d 770 (1940).

[12] See Orme W. Phelps, *Discipline and Discharge in the Unionized Firm* (Berkeley: University of California Press, 1959), pp. 32–33.

Quite the contrary is the case in the typical nonunion employment, at least for hourly workers. With only two exceptions of statutory regulation, one of which has to do with protection of the right to organize and bargain collectively, the employee not covered by a union contract may be dismissed at will and without cause or recourse, just as he may quit at will without cause or recourse on the part of the employer. This is not to say that most American employers characteristically exercise the rights which they possess in such arbitrary fashion; nevertheless they possess them. Incumbency in as well as access to the job remains always under the control of the employer.

The first exception is the protection afforded under the National Labor Relations (Wagner) Act against dismissal or other forms of discrimination or coercion because of union activity. The legislation had antecedents in the Erdman Act of 1898, state statutes outlawing the yellow-dog contract, and the Railway Labor Act.

The Erdman Act, among other things, made it a misdemeanor, subject to a fine of $100 to $1000 for each offense, to discharge an employee of a railroad because of his membership in a trade union. In *Adair v. United States*[14] the Supreme Court held this provision to be unconstitutional (Mr. Justice Holmes dissenting), using in part the following language:

> While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is [*sic*] subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to pre-

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[13] Or provided they are exercised effectively in his behalf by his union. I am, of course, aware that in the process of grievance handling compromises may be made which have the effect of a complete or partial sacrifice of an individual's right in order to arrive at a general settlement, or that, for political reasons or through sheer ineffectiveness, the aggrieved worker may not be properly defended.

[14] 208 U.S. 161 (1908).

> scribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. It was the legal right of the defendant Adair—however unwise such a course might have been—to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so—however unwise such a course on his part might have been—to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

The decision in the Adair case provoked considerable controversy. In view of subsequent development under collective bargaining, and the developing practices in France and Mexico to be described in later chapters, the following comment is especially interesting:

> Let it once be admitted that an employer's reason and motives for discharging a workman may be grounds of liability, civil or criminal, and we shall soon have other laws, similar to this Act of Congress, making other grounds of discharge than that named therein unlawful. There might be comprehensive enactment against discharging a servant maliciously or without reasonable cause. That would be the natural outcome of the beginning already made. . . .[15]

Indeed, in matters where the public policy was more clearly consistent with the views of the courts, as, for example, taking time off to vote, or attempting to influence political activities, state legislation restricting the employer's right of discharge was sustained.[16]

After passage of the Railway Labor Act in 1926 which, among other things, prohibited a railroad from interfering with or coercing its employees in the choice of bargaining representatives, the Supreme Court reversed its position in the Adair case. In 1930 it held this provision constitutional and sustained an injunction restraining a railroad employer from threatening to discharge employees who supported a union opposed by the carrier.[17]

Five years later, in 1935, the Wagner Act forbade employers generally, in industry subject to federal jurisdiction, to discriminate against employees, in hiring or firing or otherwise, because of union activity. An employer found by the National Labor Relations Board to have dismissed an employee contrary to these provisions could be required to reinstate him, with back pay. Such an order was enforceable in the courts, under sanction of fine and/or imprisonment for contempt of court. Moreover, an employer might be required to hire, or "instate," a worker discriminated against illegally at the point of employment.

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[15] C. R. Darling, "The Adair Case," 42 *American Law Review* 884 (1908). For a different view, see Olney, "Discrimination against Union Labor—Legal?" 42 *American Law Review* 161 (1908).

[16] See Note, 44 *Harvard Law Review* 1287 (1931).

[17] *Texas and New Orleans R.R. v. Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548 (1930).

There was great controversy over the Wagner Act and its constitutionality, hinging largely on the allegation of infringement of the rights of property guaranteed in the Fifth Amendment. At least one rather plaintive appeal to the traditional contractual concept of the employment relation and the doctrine that contracts of personal service could not be required to be performed specifically was made by an employer counsel in the cases testing the Act's constitutionality.

> I do not know whether we are married to the employees by a shotgun ceremony with the Board standing over us with a shotgun forever, or for how long, but for the first time, it seems to me, in the history of the English and the American law, specific performance is now set up for personal service contracts at will.[18]

The Act was sustained in a series of decisions in 1937.[19] Thereafter it was well established that an employer subject to the Act could not deprive an employee of his continuing right to his job for the reason of his union activity, nor could the employer use some pretext to do so when this was his real motive. He remained legally free, however, to dismiss an employee for any other reason or for no reason so long as the dismissal was not tainted by illegal antiunion motivation.

In view of the controversy in France to be discussed in chapter 3, it might be noted that the requirements of the National Labor Relations Act could not be met by continuing to pay an employee ordered reinstated, without actually readmitting him to his usual post of work.[20]

The second legislative development related to restriction on the right of the employer to dismiss at will is the passage in twenty-seven states of Fair Employment Practices statutes directed against discrimination in employment by reason of race, color, or creed. These statutes rely primarily on persuasion, though in some the administrative agency has power to require affirmative action to remove discrimination. This may include the reinstatement of an employee dismissed illegally, or the initial hiring of an employee illegally discriminated against in the hiring process. The more usual case of required action involves promotion or assignment denied because of race.

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[18] *Arguments in the Cases Arising under the Railway Labor Act and the National Labor Relations Act before the Supreme Court of the United States, Feb. 8–11, 1937,* S. Doc. 52, 75th Cong., 1st sess. (1937), p. 166.

[19] *NLRB v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937), and four other cases decided the same day.

[20] See *Kansas City Power & Light Co. v. NLRB,* 111 F.2d 340 (1940).

REDUCTIONS IN FORCE IN THE UNITED STATES

The only limitations on the employer's right to reduce forces for the usual economic reasons—seasonal or cyclical fluctuations in the demand for the product or in the supply of raw materials, the pressure of competition, and so forth—or for reasons of displacement made possible by new technologies or managerial reorganizations are those that have been agreed to in collective bargaining. Absent such restrictions, management in the United States remains completely free to determine for itself at any time the size of its work force and to select those employees to be separated for these reasons. Of course, management may impose upon itself procedural rules to cover these eventualities, and may make voluntary severance pay arrangements. But it also remains free to revoke such rules or arrangements at any time.

This aspect of job security is one with which organized American workers have been deeply concerned, and it has come to be generally recognized as an appropriate subject of collective bargaining. Currently, protection against job loss because of technological change is one of the most sensitive areas of collective bargaining, though precedents for negotiation on the impact of technological change go far back into the history of collective bargaining in the United States. But provisions dealing with layoffs and reductions in force for economic reasons are much more common and at least as old.

Though some exceptions exist, American collective agreements do not, in general, impose serious restrictions on the power of management to decide how many jobs shall exist at a point of time.[21] The attention of United States unions in collective bargaining historically has centered on establishing a system of priorities in the right to continued employment.

The reasons for this emphasis have undoubtedly been complex; it certainly reflects a strong institutional motivation—to prevent employers from using the necessity for a reduction in forces to undermine the union by a patently discriminatory selection of employees to be separated, temporarily or permanently. But the choice of the instrument of seniority, while serving this purpose, as would perhaps any arbitrary rule, expresses as well an established notion among American workers, and quite possibly among American employers,[22] that long service creates a special equity, and that the longer the service, the stronger the equity. It seems to represent a kind of ordering of claim which is consistent generally with the culture of the workplace.

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[21] This statement excludes the problem of job loss through technological change. It also excepts the problem of the speed-up or stretch-out, that is, decisions by management significantly to change job content in such a way as to reduce the actual or potential number of jobs. The right to subcontract is, of course, a continually sensitive area in collective bargaining.

This value can and often does conflict with others. Businessmen seek to run their enterprises efficiently and, responding to that value alone, would presumably reduce forces in inverse order of capability to perform the jobs remaining. The typical collective agreement reflects a compromise between these values.

In a study of layoff, recall, and work-sharing procedures under collective agreements conducted in 1956, the United States Bureau of Labor Statistics found that of 1743 agreements examined covering 7.6 million workers in manufacturing and nonmanufacturing industry, 1347 covering 5.8 million had provisions regulating layoffs.[23] In all of these, seniority played some role in determining the order of layoff.[24]

Seniority may be the sole determinant of the order of layoff,[25] or it may be qualified in various ways. The most common qualification is to consider skill and capacity as well as length of service. In turn, the relative importance of seniority and skill may vary. Two basic types of provisions may be distinguished. The first gives the greater weight to seniority, requiring retention of the senior employee provided he is capable of doing the work he will be called upon to perform.[26] The second type provides that if skill and capacity are equal, or "relatively equal," or some similar phrase, the senior employee will be retained.

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[22] See Slichter, Livernash, and Healy, *The Impact of Collective Bargaining on Management* (Washington: Brookings, 1960), p. 104.

[23] "Layoff, Recall, and Work-Sharing Procedures," *Monthly Labor Review,* 79 (Dec. 1956), 1386. The study did not cover the railroad and airline industries. It should be noted that on the railroads fairly strict seniority provisions determine the order of layoff, and it has also been customary to set monthly mileage limitations for the operating employees as a kind of work-sharing device. Furthermore, of the 322 agreements without layoff provisions, 118 (of an industry total of 124) were in the construction industry.

[24] *Ibid.,* 80 (Feb. 1957), 179.

[25] One of the more important and complex variables that apportion relative equities is the determination of seniority "districts," that is, the question of whether employees in the entire bargaining unit shall be arranged in seniority order, or whether the unit shall be divided into subgroups—by department, skill, or otherwise—for this purpose. Since no generalizations can be made on this subject, it will not be dealt with here.

[26] Of course, there is a strong presumption of capability if he is to remain in the job held before the layoff. However, he may be "bumped down" as the employees to be retained are redistributed, by seniority, among the remaining jobs. Thus, he may be placed in a job which, though of lower classification, may call in to question his capacity to perform it.

Some clauses lie between these two basic types in the relative weight given seniority and ability.

The extent to which qualification of seniority modifies also the deprivation of managerial control over incumbency in employment depends on the extent to which restrictions are placed on the managerial power to determine relative abilities. Generally the managerial decision can be called into question through the grievance procedure, and ultimately before an arbitrator. Depending, however, on the language of the contract clauses, the burden may lie on the union to show that the choice of the junior employee was arbitrary or discriminatory, or, at the other extreme, the management may be required to show affirmatively the substantially greater ability of the junior employee if it is to be permitted to retain him at the cost of a job for the senior employee. In the case of clauses requiring only that the senior employee be retained when abilities are substantially equal, it is often held by arbitrators that the junior employee must be shown to be "head and shoulders" better than the senior before he may be retained.[27]

TABLE 1

TYPES OF QUALIFIED SENIORITY DETERMINING THE ORDER OF LAYOFF IN MAJOR COLLECTIVE BARGAINING AGREEMENTS, 1954–55

Qualifications of seniority	All industries		Manufacturing		Non-manufacturing	
	Number of agreements	Workers (thousands)	Number of agreements	Workers (thousands)	Number of agreements	Workers (thousands)
Total[a]	749	2,737.5	635	2,427.5	114	310.0
Seniority governs, provided senior employee is competent to do available work	350	1,039.5	313	937.2	37	102.3
Seniority secondary, i.e., governs only if ability is equal to that of competing employee	264	1,101.6	215	979.9	49	121.7
Consideration given seniority not clear	125	557.8	97	471.9	28	86.0
Other[b]	10	38.6	10	38.6	...	...

[a] Because of rounding, sums of individual items do not necessarily equal totals.

[b] Includes agreements in which the type of qualified seniority varied by length of service or type of occupation.

SOURCE: *Monthly Labor Review*, 80 (Feb. 1957), 180, Table 2.

Of the 1347 agreements in the BLS study containing seniority provisions for layoffs, 579 made seniority the only criterion in determining order of layoff. Nineteen had either no specification as to the way in which seniority would be applied, or straight seniority for some employees and qualified seniority for others.[28] Table 1 shows the distribution of the remaining 749 with some form of qualified seniority.

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[27] For a discussion of the application of seniority clauses by arbitrators, see Elkouri and Elkouri, *How Arbitration Works* (2d ed.; Washington: Bureau of National Affairs, 1960), chap. 14.

A relatively small group of collective agreements requires that management consult with the union in order to explore possible alternatives before undertaking a layoff. A few others provide automatically for reduction in the work week before a layoff takes effect. Again, a minority provides for various kinds of work-sharing devices, such as elimination of overtime. Other collectively bargained devices to protect the employment of regular employees include elimination or restriction of subcontracting, prohibition of new hires, restriction of shift operation, or the initial dismissal of part-time or temporary workers.[29] These, however, are exceptional; in general the right of management to make the layoff decision remains.

In another major respect, American collective bargaining practice has departed far from its British common-law and contractual antecedents. Employment relations based principally on the dominance of the individual contract of service do not normally envisage a continuing relation between the employer and a former employee no longer rendering service. But characteristically United States collective agreements give laid-off employees prior rights to re-employment, and specify the ordering of these rights. Such provisions are enforceable in the same fashion as any other provision of the collective agreement, so that the laid-off worker continues a connection with the employer as an employee in special status who can enforce his right to reoccupy his job, under the conditions and in the manner prescribed in the contract.[30] Virtually all collective agreements that have provisions governing order of layoff contain parallel provisions governing recall rights, usually ordered by the same criteria.[31]

Attempts by American trade unions to control the impact of both technological and organizational change on job equities are almost as old as the labor movement itself, but recent years have seen an extraordinary sharpening of these problems. Writing in 1941, Sumner Slichter characterized trade-union policies toward technological change as falling into the categories of obstruction, competition, and control.[32]

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[28] *Monthly Labor Review*, 80 (Feb. 1957), 180. Though this study is now eight years old, practice with respect to these matters has so crystallized that change is probably minor.

[29] See *Monthly Labor Review*, 79 (Dec. 1956), 1388 ff.; 80 (Jan. 1957), 1 ff.

[30] Many agreements set a time limit on the retention of recall rights.

[31] *Monthly Labor Review*, 80 (March 1957), 329 ff.

[32] *Union Policies and Industrial Management* (Washington: Brookings, 1941), chaps. 7, 8, and 9.

Each type of attitude has found its way into collective agreements. A classic example of control, the insistence by the Typographical Union on job opportunities for displaced compositors as operators of the new linotype machines, dates back to the turn of the century. The Washington Job Protection Agreement of 1936, providing for certain forms of protection in continued employment and large severance pay allowances for workers displaced by railroad consolidations and mergers, is an early example of effective control of the job impact of organizational change.

Recent concern over the impact of automation has led to experimentation with a great variety of devices to control the destruction of job equities by changed production techniques. Severance pay has become more common, though contractual provisions are still relatively rare.[33] In the railroad industry, pacing the rate of change to attrition of workers is common. In the Pacific Coast longshore industry, agreements have been reached under which the employers, by paying into a special fund, have "bought out" work rules restricting the use or rate of introduction of automated processes. The new Kaiser Steel Corporation plan provides a guarantee against the loss of employment by reason of technological change.

The variety of arrangements is so great, and the bargaining problem so acute and shifting, that no generalizations can be made about the frequency or the character of protections in collective agreements. But it is apparent that the threat to job security represented by technological change provokes sharp reactions by American unions, and that increasingly collective agreements recognize the equities of workers whose jobs are threatened, providing either some kind of liquidated damages or restrictions on the unilateral power of management to make changes which destroy job equities. It is perhaps in this context that the explicit notion of property rights to employment is most frequently used.[34]

SUMMARY

It seems to me apparent that one function of collective bargaining in the United States has been to wrest from the employer a large measure of control over incumbency in jobs, and at least some measure of decision over how many jobs there shall be. Short of economic or technological change which may modify the relation, an employer who is party to a collective agreement takes on an employee for life or at the pleasure of the employee. He no longer retains the right to terminate the relationship, which has become, basically, one of employee to job rather than employee to employer. That relationship is at least analogous to ownership.

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[33] See U.S. Bureau of Labor Statistics, *Employer Expenditures for Selected Supplementary Remuneration Practices*, Bull. no. 1308 (1962).

[34] See, for example, William Gomberg, "The Work Rule Problem and Property Rights in the Job," Industrial Relations Research Association, *Proceedings*, Spring 1961. Cf. Simon Rottenberg, "Property in Work," *Industrial and Labor Relations Review*, 15 (April 1962), 402, in which Rottenberg argues against bargaining policies expressing the concept of property rights in jobs.

Further, if economic or technological circumstances threaten to diminish the number of jobs the employer may be required to keep the reduction to a minimum or to transfer the equities of employees in existing jobs to newly appearing ones. In some cases, a kind of liquidated damages is paid for destruction of rights. Moreover, arbitrary rules order employee equities so that, in general, the employer cannot unilaterally decide who shall be jobless and who shall remain. Seniority, more or less modified, orders these equities among employees, and, to the extent it does so, the employer remains an outsider in the decision as to continued incumbency.

It is particularly important to note that, in the world of collective bargaining in the United States, no question remains as to the right of a worker to reinstatement if he has been improperly deprived of his job, because this is an extremely sensitive issue in each of the other countries to be examined. We have succeeded in separating the job from the employer so completely that the issue of impossibility or impracticability or indeed immorality of requiring continued association is no longer raised, as it is elsewhere. Such notions are embedded in the contractual concept of the employment relation, and the United States has largely abandoned that personal and libertarian concept. If the job belongs to the employee, he should be restored to it, and to do so in no wise impairs an inherent individual liberty of the employer.

Outside the sphere of collective bargaining, as we have observed, the situation is different; there the job belongs to the employer to dispose of more or less as he will. This is still true of a majority of American jobs, even leaving aside governmental employment which is subject to its own sets of rules. Nevertheless, in my view, unorganized workers feel much the same sense of job ownership; they merely have not found means to enforce it.

At any rate, in a major segment of American industry, comprising virtually the whole of the manufacturing, mining, construction, transportation, and communication industries, collective bargaining institutions give strong evidence of the development of a sense of proprietorship in employment. Recent controversy over work rules and technological change is further evidence of the sharp reaction which threats to job security produce. Judging by the American experience at least, the uncertainties of the industrial world bring out this sense of property in employment. In the United States it has led to a fashioning, through collective bargaining, of institutions which give to the worker a firm claim against arbitrary individual dismissal, and an ordering of claims in the face of destruction of jobs through market or technological change.

American legal institutions derived largely from British sources. The basic economic institutions of the two countries have remained similar, and our two cultures and approaches to social and economic problems have historically been much the same. With respect to certain specifics, however, substantial differences have appeared. As the next chapter will show, the customs surrounding the individual employment contract began to diverge in the latter part of the nineteenth century. The legal status of collective agreements diverged even more sharply. Mainly since the turn of the century, British trade unions have taken a somewhat different view of their social and economic functions, and they have succeeded in enlisting the loyalties of larger segments of the working people.

Chapter 2 examines British institutions with a view to discovering evidences of the development of similar outlooks toward industrial employment, and of institutions to give them expression. Chapters 3 and 4, dealing with France and Mexico, respectively, have the same purpose. France was chosen as an advanced Western industrial country with a different legal system, a different culture, a differently oriented trade-union movement, and a different system of collective bargaining.

France, Britain, and the United States, however, all developed their contemporary systems out of a dominantly liberal nineteenth-century past. Its slogans still permeate all three societies. In Mexico, liberalism was the slogan of the Revolution of 1857, and both the Constitution of 1857 and the Civil Code enacted in 1870 bore at least a surface relationship to basic Western European charters and ideologies, more particularly as expressed in France and the countries influenced by the Napoleonic Codes. Private property and the contract as the law of the parties at least formally shaped employment relations. Indeed, it is astonishing how deeply embedded in the Mexican society these ideologies and institutions became. Yet the Revolution of 1910 and the Constitution of 1917 represented in some measure a conscious repudiation of liberalism as the revolutionaries understood it.

Nevertheless, Mexico is an industrializing country, well to the fore among those countries that have not yet achieved industrial maturity. It is faced with the universal strains produced by economic dynamism. It has also achieved a substantial degree of social and political stability. It seemed to me appropriate to include it in the set of comparisons as an example of a country industrializing against a background of borrowed European institutions.

It must be admitted, of course, that the choice of countries for comparison was guided in considerable measure by adventitious circumstances—those of opportunity, ability to deal with the language, and others. Nevertheless, I hope that the breadth of comparison is sufficient to permit the drawing of some conclusions.

Chapter 2

Conflict over the Right to Work in Britain

In the United States, the value-laden phrase "right to work" has a special meaning, describing state legislation which forbids the union security agreements typically a collective bargaining objective of American unions. It purports to protect the right of the nonunionist to obtain and remain in employment while continuing to refrain from union membership.

In Great Britain, however, the phrase has a more general meaning, one American unions suggest is more appropriate when they remark that right-to-work legislation guarantees no one the right to employment. In Britain it carries the meaning that people inherently have the right to make a living, and that public policies ought to guarantee this right by providing full employment. But, as the following discussion will suggest, this end, even if achieved, apparently would not satisfy the demands of British workers that they should have some security in the jobs which they happen to hold. Right to work must mean to them not only access to a new job after having lost or quit an old, but also the right to continue in the old.

Background: The Anglo-Saxon Contract of Employment

The achievement of formal equality between employer and employee in the individual and contractual relationship was fairly late in coming both in Great Britain and in the United States. Until the 1860's in both countries, law and public policy in many of its aspects placed the individual worker at great disadvantage in his dealings with his employer.

We leave aside the issue of slavery or serfdom in both countries; until 1799 Scottish coal miners were literally bound to their masters.[1] But despite the long antecedents of the common-law doctrine of equity that a contract of personal service could not be enforced by specific performance,[2] alternatives existed in both England and the United

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[1] See R. Page Arnot, *The Scottish Miners* (London: Allen and Unwin, 1955), chap. 1. For an analogous system for English miners of the Tyne and Wear, see Hammond and Hammond, *The Skilled Labourer* (London: Longmans, Green, 1919), chap. 2.

[2] See *Stocker v. Brocklebank,* 42 Eng. Rep. 257 (1851); *M. Clark's Case,* 1 Ind. (Blackford) 122 (1821).

States which had the practical effect of binding the worker to his master, though he had no similar assurance of continuance in employment.

For centuries English law was based on the principles of the Statute of Laborers (1351), which established the fundamental duty to work,[3] and that duty was enforced in a variety of ways. Imprisonment for debt, in both England and the United States, served as a severe sanction against the worker who owed his master either wage advances or other sums.[4] In England, until the Master and Servant Act of 1867 and the Employers and Workmen Act of 1875, breach of a contract of employment by the employee was, under the Master and Servant Act of 1824 and preceding legislation, a criminal offense, while a similar breach by the employer was merely a civil offense. Furthermore, an employee charged under the law was subject to immediate arrest, was tried before a Justice of the Peace who was likely to be an employer or landed gentleman, and was denied the right to give evidence in his own behalf. After 1875, at least at formal law, employer and employee had identical and only civil recourses for breach of employment contracts.[5]

In the United States, though imprisonment for debt was generally abolished before 1850,[6] until the passage of the Thirteenth and Fourteenth Amendments the constitutions and law of each state determined whether criminal sanctions might be applied to breaches of contract or of indentures, or indeed whether forms of forced labor, such as peonage, outside the usual contractual type might be enforced. But with the post-Civil War constitutional amendments, state law enforcing labor other than by civil suit for damages under a contract of employment became invalid, both constitutionally and under the federal antipeonage statute of March 2, 1867.[7]

From about 1870 until the modern period, then, in both Great Britain and the United States the familiar general principles of the common law of master and servant (or employer and workman) governed the individual relationship between the worker and his employer. Each was legally free to enter into such a relationship as he wished.

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[3] Landis, *Cases on Labor Law* (Chicago: Foundation Press, 1934), Historical Introduction.

[4] See *Report from the Select Committee on Master and Servant,* British Sessional Papers (Commons), 1866, Vol. 13; Commons and Andrews, *Principles of Labor Legislation* (New York: Harper, 1920), pp. 31, 47.

[5] Under the Act of 1875, the parties may, by consent, waive the specific-performance rule. See Mansfield Cooper and J. C. Wood, *Outlines of Industrial Law* (3d ed.; London: Butterworth, 1958), p. 78. Under the same Act, a court of summary jurisdiction may order an apprentice to perform his duties, subject to possible imprisonment. *Ibid.*, p. 91.

[6] Commons and Andrews, *op cit.*, pp. 31, 47.

[7] *Clyatt v. United States,* 197 U.S. 207 (1905); *Bailey v. Alabama,* 219 U.S. 219 (1911).

Each could terminate the relationship when and as he wished. Generally, where the contract was for definite term, or for indefinite term but with contractually specified period of notice, breaches of the contract, as, for example, misconduct on the part of the worker or failure of the employer to abide by promises made as to wages, hours, and working conditions, gave the usual right to rescind the contract by summary discharge or quit. Otherwise, a quit or dismissal before the end of the contract or without contractual notice gave rise to possible damages.[8] Though in Britain it was at least possible that such damages might be more than pay in lieu of notice,[9] this was the usual measure of damages for a worker dismissed without sufficient cause.

In the United States, with the development of the custom of employment relationships terminable at will and without notice, this issue of damages under suits based solely on the individual contract became largely academic. However, at least three state statutes were passed in the latter half of the nineteenth century providing that where the employer retained the right to forfeiture of earned wages as liquidated damages for quits without notice, this was also the measure of damages to which an employee dismissed without notice should be entitled.[10]

In Britain, where notice periods remained the custom and the individual contract of employment was still of significance, apparently under classical notions of contractual reciprocity an employee leaving without notice could be subject to damages to the employer equal to the wages he would have earned during the contractual period of notice. Such suits seem to have been extremely rare, at least as to manual workers. However, they can be and have been used in cases of strikes without notice. The National Coal Board has occasionally sued wildcat strikers as a means of sanction.

Prior to the passage of the Master and Servant Act of 1867, largely relieving workers of the possible criminal sanction for breach of contract, varied notice customs prevailed. However, there seems to have been a significant movement toward "minute contracts," that is, contracts terminable at will. This movement, though supported by some employers, often had as its purpose the avoidance of criminal liability on the part of workers for quits without notice. In some areas it was strongly supported by the trade unions, since criminal prosecutions could follow on a strike, unless notice had been given. In a number of industries notice periods were so long that strikes became dangerous or even impossible.

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[8] Or a suit for *quantum meruit,* for compensation for the value of services rendered.

[9] See F. R. Batt, *The Law of Master and Servant* (4th ed. by Vaines; London: Pitman, 1950), pp. 202 ff. Here it is said that in addition to pecuniary loss including not only wages but tips, value of board and lodging, etc., "it is submitted that the jury is entitled to take into consideration the difficulty of getting employment; thus, although a servant is liable to dismissal by a week's notice, if he is wrongfully dismissed, the jury may, upon proper evidence, award him considerably more than a week's wages." But see Cooper and Wood, *op. cit.,* p. 80, where it is argued that the worker cannot get damages based on difficulty of finding new employment.

[10] Maine Rev. Statutes, 1916, c. 49, § 35; Mass. General Laws, 1921, c. 149, § 159; N.J. Comp. Statutes, 1910, § 79.

For example, according to George Newton, a small manufacturing potter appearing as a representative of a Glasgow workingmen's association before the Select Committee on Master and Servant in 1866, the custom in the pottery trades before 1867 was to hire from Martinmas to Martinmas, with the worker bound for this period, though he could be dismissed on a month's notice. Newton testified regarding prosecutions for strike action in the pottery industry under the criminal provision of the Act of 1824. He also testified that in Glasgow in the carpentry and joining trades minute contracts then prevailed.[11]

Alexander Campbell, who was a major figure in the movement to change the law, testified in the same proceeding that minute contracts terminable on an hour's notice had become prevalent in the Glasgow building, engineering, and shipbuilding industries.[12] Alexander McDonald, the Scottish miners' leader who also played a large role in agitating for legislative reform, testified in 1866 that twenty-seven years earlier Scottish mining contracts of employment had been for a period of a year. They subsequently became fortnightly contracts, and were now largely minute contracts. In the English mines there was a similar, though much slower, movement. At the time, McDonald said, Durham mining contracts were still for a year, though he mentioned a strike of unorganized workers to gain minute contracts.[13]

Apparently the passage of the statutes of 1867 and 1875 halted the movement for contracts of employment terminable at will and without notice, though the excessively long notice periods (or contracts of definite term for very long periods) seem gradually to have disappeared.

Vestiges of older customs remained in the common-law presumption that a contract for general hire was to be for a year. Blackstone put it this way: "If the hiring be general without any particular time limited, the law constitutes it a hiring for a year; upon a principle of natural equity that the servant shall serve and the master maintain him, throughout all the revolution of the respective seasons; as well when there is work to be done, as when there is not."[14] This was always, however, a rebuttable presumption, and the more modern rule seems to be that the notice, if not explicit, shall be that which is the custom in the trade, or, if no such custom is discoverable, a "reasonable" notice.[15]

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[11] Testimony of George Newton in *Report from the Select Committee, op. cit.*, pp. 1 ff.

[12] Testimony of Alexander Campbell, *ibid.*, pp. 14 ff.

[13] Testimony of Alexander McDonald, *ibid.*, pp. 24 ff.

It is not at all clear what the early rule was in the United States with respect to either the law or the custom for notice periods. Wood, writing in 1877, says: "... with us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will ...," in contrast to the English rule.[16] The cases he cites, however, do not seem particularly in point. Nevertheless, Wood was subsequently cited in the courts as authority for this presumption.[17]

Commons and Andrews argue that contracts terminable at will served as protection to the employer in a legal system in which, first, specific performance could not be enforced, and, second, though the employee might obtain damages against his employer, a damage award against a propertyless worker was useless.[18] From this we infer that as state and federal law developed so as to prevent specific performance, directly or indirectly, the practice of contracts terminable at will also grew, crystallizing into the legal presumption in the period immediately after the Civil War.

Thus, by about 1875 in both Britain and the United States complete formal equality was achieved in the legal relationship between worker and employer. In both countries, generally speaking, each was completely free to accept or reject offers of employment and to terminate the relationship at any time. In both, where that termination amounted to breach of contract, damages were the only recourse, measured usually as to both parties by a sum equal to the wages that would have been paid or earned in an unworked notice period, or by wages earned and unpaid. The characteristic distinguishing the employment relationship from most kinds of contracts was the fact that specific performance could not be enforced.[19] To enforce it upon the worker amounted to involuntary servitude; to enforce it upon the employer when it could not be enforced upon his employee would violate the rule of reciprocity, and also was regarded as impossible considering the alleged intimacy and personal character of the employer-employee relationship.

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[14] *Commentaries* (Gavit ed.; Washington: Washington Law Book Co., 1892), p. 179.

[15] Cooper and Wood, *op. cit.*, pp. 52–53; Batt, *op. cit.*, pp. 54–59.

[16] H. G. Wood, *A Treatise on the Law of Master and Servant* (Albany: Parson, 1877), p. 272.

[17] See *Louisville & Nashville R.R. v. Offut*, 99 Ky. 427 (1896); *Louisville & Nashville R.R v. Harvey*, 99 Ky. 157 (1896). See also the discussion of "Wood's Rule" in Alfred Blumrosen, *Materials and Cases on the Law of the Employment Relation* (1962), pp. 190–97.

[18] *Op. cit.*, p. 4.

[19] The ancient rule concerning specific performance of contracts was more general, distinguishing between contracts to give (*dando*) and contracts to do (*faciendo*) in English as well as Roman law. See Robert S. Stevens, "Involuntary Servitude by Injunction," 6 *Cornell Law Quarterly* 235 (1920–21). For French and Mexican doctrine, see chapters 3 and 4 below.

However, a significant difference in practice had developed as between Britain and the United States. Though employment relations were reciprocal and formally equal, in the United States the typical industrial practice provided the mutual right to terminate the relationship at will and without notice or liability; in Britain there was, characteristically, a notice period, with liability for pay in lieu of notice unless cause existed for summary quit or dismissal. That notice period, at least until the development of special redundancy schemes, tended to be about one week, though exceptions existed.

From this point on, British and United States practice and, in one major respect, British and United States law diverged. American unions, much more and much earlier than the British, began to concern themselves with problems of the security of workers in their employment and to develop through the collective bargaining process a series of rules establishing rights. And the rise of different legal statuses of collective agreements in the two legal systems gave different significance to the rules.

British Practice on Individual Dismissals

As we have observed, at law the British employer retains the right to terminate an individual employee, with notice, or summarily if there is a contravention amounting to breach of contract. In contrast to the situation in the United States, these rights typically are not waived in collective agreements. If they were, the waiver would not be binding since the collective agreement has no standing at law except possibly as evidence of custom and usage in the trade.[20] With respect to individual dismissals, if there were substantive provisions in the collective agreement they would be no more than an unenforceable promise on the part of the employer to enter into agreements with individuals on certain terms. Procedural guarantees of due process, like an American grievance procedure, would have no different standing.

British collective agreements typically consist of two basic parts: a collection of substantive agreements about wages, hours, and working conditions arrived at from time to time; and a "procedure agreement," usually of long standing, which sets out a method of handling differences of any kind between the parties.

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[20] The Contracts of Employment Act of 1963 providing, among other things, for "written particulars of employment" permits, in lieu, reference to "some document," presumably the collective agreement.

Substantively, the typical British agreement is silent on questions of dismissal for disciplinary reasons, for incompetence, or for any individual cause. Such provisions as may appear by inference protect the right of the employer to dismiss workers as and when he wishes. This implicit employer right is embodied in those collective agreements which contain notice provisions. For example, the agreement in Civil Engineering Construction provides:

> XD. TERMINATION OF EMPLOYMENT
>
> Employment shall be terminable by 2 hours' notice tendered by either Employer or Operative, such notice to expire at the end of the normal working hours on Friday, provided always:—
>
> (I) That, during the first six working days of employment, termination of employment shall be upon the tendering of 2 hours' notice by either Employer or Operative, such notice to expire at the end of the normal working hours of the day.
>
> (II) That, save in respect of the length of notice required to terminate a contract of employment, the employment shall, as heretofore, be deemed a contract from hour to hour and the Employer's liability for payment shall (save as provided by the Rules relating to payment in respect of the guaranteed minimum) be limited throughout the contract of employment to payment only for time actually worked.
>
> (III) That, if for any cause (other than inclement weather) work ceases on the section of the work on which an operative has been engaged, employment may, if no alternative work is available, be terminated at the option of the Employer at 2 hours' notice expiring at the end of any day.
>
> (IV) That, in cases of misconduct, an operative may be summarily discharged at any time.
>
> (V) That, at the discretion of the Employer, an operative may be transferred at any time during the period of his employment from one job to another.[21]

Though the civil engineering agreement specifically preserves the right of the employer to dismiss a worker summarily for industrial misconduct, this is more often implicit, the more typical agreement simply stating the agreed period of notice. For example, the London Master Printers agreement provides simply: "Members of the Society whether piece or establishment hand, if retained beyond fortnight, to receive and give a fortnight's notice, prior to their engagement being terminated."[22]

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[21] Civil Engineering Construction Conciliation Board, Working Rule Agreement made by the Board on March 22, 1921, revised by the Board on Aug. 29, 1945, and containing amendments agreed to by the Board up to and including May 27, 1957.

Many agreements contain no specific provision for notice at all, so that established custom governs the period of notice, it still being understood that the employer may dismiss summarily for misconduct. In typical manufacturing industry, the customary period of notice, prior to the passage of the Contracts of Employment Act of 1963, was about one week.[23]

British procedure agreements are designed primarily to handle questions of changes in wages, hours, and working conditions. However, their constitutions typically place within their purview the settlement of any and all differences between the parties. Though by agreement there is no impairment of the right of management to terminate an employee, the exercise of that right can create a difference which is susceptible of submission to the established procedure.[24]

The typical agreement, after providing for or assuming some kind of negotiation at the plant level, establishes regional or area joint councils composed of employer and union representatives, and a national bipartite joint council empowered to consider such differences as may be referred from below. Agreement of both sides is necessary for determination of a dispute. Nothing but moral force, however, obligates the union and employer involved to accept a decision. Occasional reference is made to possible final and binding arbitration. But application of these provisions is rare, and again the sanction for the acceptance of an arbitration award is only moral.

In the event of failure to reach agreement in a joint council, the decision of plant management stands. The union commits itself to abstain from strikes during the proceedings, but it is both legally and morally free to strike after exhaustion of the procedure.

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[22] Agreement between the London Master Printers Association and the London Typographical Society, Sept. 3, 1959, contained in the Society's *Fifth Annual Report* for the year ended Dec. 26, 1959.

[23] See Ministry of Labour, *Security and Change* (London: H.M. Stationery Office, 1961), p. 9.

[24] The typical procedure agreement makes no specific reference to disputes over dismissals. However, the engineering industry procedure agreement, after a section dealing with displacement because of technological change or work reorganization, provides: "Nothing in the foregoing shall affect the usual practice in connection with the termination of individual workpeople." Agreement between Engineering and Allied Employers' National Federation and the Trade Unions, June 2, 1922, as amended Aug. 10, 1955. But a following procedure seems to be all-inclusive, and, as indicated below, occasional individual dismissals have been referred to it.

On the other hand, the building trades procedure agreement specifically mentions "termination of employment" as within the jurisdiction of the joint council established by the agreement. See Constitution, Rules and Regulations, National Joint Council for the Building Industry, as adopted by the Council and Adherent Bodies, Jan. 1949.

Examination of various joint council proceedings indicates that appeal of cases of individual dismissals is rare. It appears most commonly in the transactions of the National Building Trades Joint Council, and these illustrate in almost an exaggerated form the differences between British and American views of the notion of job security.[25]

The agreed notice period in the construction industry is two hours' notice which must terminate at the end of the workday on Friday. That is, the employer may give notice of dismissal at any time during the week up to two hours before work ends on Friday, the dismissal then taking place at the end of the day on Friday. Interviews with union officials in the industry and with the secretary of the National Joint Council established that the typical practice of employers in the industry, when they wish to dispose of the services of an individual worker, is simply to give notice without stating any reason. The worker then either works out the week or receives pay in lieu of notice. There is no question of the employer's right to separate a worker in this fashion.

The employer also has the right summarily to dismiss a worker for industrial misconduct. If he does so, he must be prepared to establish the fact of the misconduct and its sufficient gravity. It is this type of case which occasionally gets into the disputes procedure. The dismissed worker has a right of appeal to the regional council and thence to the National Joint Council, where his judges are employers in the industry (not his own) and union representatives.

Examination of the records of the National Joint Council disclosed that occasional appeals against dismissals for misconduct reached the national procedure,[26] and in something less than half the cases the dismissal was not sustained. However, when the employer's decision to dismiss is reversed, the worker is simply paid for the period from dismissal through the succeeding Friday, in lieu of the notice he should have been given. He is not reinstated.[27]

Interviews and examination of union records in the wholesale and retail trades revealed similar practices. Here the notice period is generally one week, and the employer typically dismisses a worker without assigning a reason, giving pay in lieu of notice. If a reason is given and the dismissal is a summary one, the case can be and sometimes is submitted to the disputes procedure, with possible final submission to arbitration. The parties, however, reserve the right to reject the arbitration award.

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[25] I am aware, of course, that in the United States notions of job possession in the casual trades such as construction are usually collective rather than individual, and find expression largely in closed-shop practices and restrictions on entry into the trade.

[26] The secretary of the council estimated that 90 per cent of the cases were settled at the regional level.

[27] Of course, in the building trades, the chances are good that the job on which the worker was working may have been completed. In this case, the equivalent to reinstatement would be back pay from the dismissal to what would have been normal termination of the employment.

One case actually going to arbitration in 1958 is worth summarizing for the several approaches it reveals. The case involved a woman employee of a cooperative society in Wales. Hired when single, she became married while still employed, and was dismissed for this reason. The arbitrator held that the dismissal procedures were improper, and awarded back pay from the date of the dismissal to the date of the award, but upheld the dismissal itself. He then directed the company to make clear to single women employees the terms of employment which subjected them to dismissal if they married.

Records of the Central Conference of the engineering industry, published from time to time in the Amalgamated Engineering Union *Journal,* reveal occasional dismissal cases considered there. Often these are cases of alleged "victimization" of shop stewards, though other kinds appear. The demand of the union here is usually for reinstatement, and sometimes such agreement is reached.[illegible] More often, the parties at Central Conference are "unable to arrive at a mutual recommendation"; thus the employer's action stands. Sometimes cases are remanded to the local level for further action; this often indicates an implicit understanding on the disposition of the case.

Interviews with officers of British employers' federations and with individual British employers disclosed a universally held view that discipline must remain strictly a matter of managerial prerogative. Not only this, but in British management's view, employers must generally be free to make their own mistakes. While they are willing to listen to aggrieved workers or their representatives, they are unwilling to commit themselves to reinstate workers wrongfully dismissed, though this is occasionally done voluntarily. Among larger employers, voluntary transfers of workers whose dismissals appear to be on doubtful grounds or without foundation are sometimes arranged.[illegible] But reinstatement to a position under the same supervision ordinarily seems impossible or impractical.

[illegible] This decision, however, is not binding on the particular employer.

[illegible] Where this practice was indicated, inquiry was made as to whether it caused problems of interference with promotion or other rights of workers in the department or plant to which the transfer was made. The answer was no, because rules as to promotion and transfer in British industrial practice are generally much less rigid than in the organized American plant.

Surprisingly to the American observer, with the exception of victimization for union activity, this attitude of British employers was generally shared by union officials.[30] Save for protecting their institutional interest, the official union position is usually that discipline is not a matter with which the union is properly concerned. But there are union officers who, when questioned about the seeming inadequacy of disputes procedures to handle cases of unjustified discipline, reply that their union relies on economic power at the plant level to achieve justice.

It is, however, quickly apparent that, even in periods of high employment when new jobs are relatively easy to find, the official view is not shared by British workers and by their plant-level representatives. Disciplinary dismissals are a major cause of "unofficial" strikes.

British strike statistics do not distinguish between strikes over "redundancies" and those over other kinds of dismissals, but in 1960 about 10 per cent of all strikes, workers involved, and working days lost were caused by "disputes concerning the employment or discharge of workers."[31] If wage disputes are eliminated, the proportion of strikes over these matters rises to more than 20 per cent. Of the "Principal Stoppages in 1960," about 100,000 workers were involved in seven strikes whose causes were listed as:

> The dismissal of a shop steward for alleged industrial misconduct.
>
> The dismissal of two shop stewards for trade union activities not recognized by the employer, and the subsequent refusal to reinstate them.
>
> The dismissal of a shop steward for alleged industrial misconduct.
>
> To protest against the dismissal of a worker for alleged unsuitability.
>
> To protest against the dismissal of a number of workers for alleged industrial misconduct.
>
> The dismissal of a worker for alleged industrial misconduct.
>
> The dismissal of a shop steward for alleged industrial misconduct.[32]

The Ministry of Labour was kind enough to permit examination of its records underlying its compilations of strike statistics. These records give some information about the precipitating cause of the strike and its settlement. We have commented on the application of the building trades disputes procedure to dismissal issues. There were found in the records for the year 1958 forty construction industry strikes whose cause was dismissal of workers, including shop stewards, for misconduct or "unsuitability." These strikes involved about 7500 building trades workers, and their duration ranged from two to forty-five days. In nineteen of the strikes, involving about 2500 workers, reinstatement was obtained.[33] In the remainder, reinstatement was not won as part of the strike settlement, though in some there was agreement to continue negotiations in one form or another. Another forty strikes were found in private industry other than building, involving directly over 8000 workers, in which individual dismissals for misconduct or incompetence were the stated issues. In half of these, involving slightly more than half the total of workers, reinstatements were a result.

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[30] The term "union official" in Britain generally excludes shop stewards. The attitude of shop stewards, as will be seen, is often considerably different. See the London *Times* story (June 20, 1960) on the Cooper proposal mentioned below, in which the *Times*'s Labor Correspondent says: "The right to dismiss is one of the most cherished prerogatives of the British employer and generally appears to have been accepted by unions in theory, though in practice dismissals have frequently been the cause of disputes and strikes, particularly when the workers have been persuaded that one of their number has been victimized for trade union activities."

[31] Ministry of Labour *Gazette*, May 1961, pp. 188–89.

[32] *Ibid.*

The Research Department of the National Union of General and Municipal Workers made available a compilation of unofficial strikes in 1959, not all involving its members. This shows that major strikes occurred, at least on the surface, over such issues as the dismissal of a 61-year-old man caught with a flask of tea in his hand during working hours (a week's strike of 1000 men); the dismissal of a man allegedly playing cards when he should have been working (one-day walkout of 500 men employed by a contractor at an atomic energy site); and suspension of a man for eating a meat pie during working hours (two-day strike of 800 men).

There is substantial other evidence to the same effect, but it would be merely cumulative. There is little doubt, first, that whatever the official attitude of British trade unions and the collective bargaining position, British workers are quite willing to invoke their solidarity and economic strength to protect themselves against what they regard as unwarranted loss of employment; and, second, that their object is to secure reinstatement, not merely pay in lieu of notice or some other solution implying continued separation from employment.

So strongly held is this attitude that one senses a greater reluctance among British employers, despite their insistence on their prerogative unilaterally to terminate employment, than among American to undertake to dismiss workers individually. This was confirmed in a rather curious way. When discussing the problems involved in reductions in force, many British employers indicated that they selected for separation at such times those workers who had poor records of absenteeism, offenses against company rules, incompetence, and the like. When they were asked why such workers had not been dismissed earlier or at the time of the commission of the offense, the replies indicated a fear of collective reaction. At the time of a layoff, however, the workers were in a much weaker position to protest, since the protection of one worker meant loss of a job for another.

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[33] In a few cases more than one worker was involved. In some of these, not all the workers were reinstated.

Unofficial strikes have become a major issue in British industrial relations and public policy. One of the objectives of the Contracts of Employment Bill, recently introduced into Parliament by the Conservative Government and discussed below, was to reduce their number. The concern is general, though dismissals are a major cause. As one commentator remarked, "It is curious that Britain should be almost the only industrial country in the world where the sole means of challenging dismissals alleged to be unjust is to turn them into industrial disputes."[34]

This comment was provoked by a proposal of J. Cooper, chairman of the National Union of General and Municipal Workers, that Britain consider a system like the American arbitration of disciplinary dismissals. Cooper's remarks in connection with his proposal are of interest in a number of respects, but the most relevant here is his belief that American management is more hesitant about "sacking" than British.[35] This, of course, is contrary to the view expressed above. Arbitration provides a way of testing and correcting possibly mistaken decisions. The consequences are known and the results, within limits, are predictable. British management lives in a world of virtually complete uncertainty about the consequences of a dismissal, and our observation of the two systems leads to the conclusion that British management, in general, is more reluctant to dismiss than American, though with exceptions to this generalization on both sides of the Atlantic.

So far as is known, Cooper's proposal produced little more than a few letters to the London *Times,* though he predicted that it would meet considerable hostility in management and would have some appeal in the labor movement. It would require substantial institutional change if it were to be a true analogue of the American system, in which arbitration awards are binding in a legal sense. But this might not be a necessary ingredient of a British system of testing the equity of dismissals. Cooper suggested that the machinery resemble the system under which the Ministry of Labour now examines disciplinary dismissals to discover the eligibility of a claimant to unemployment compensation. Interviews with field officers of the Ministry indicate that since the employer, unlike his American counterpart in a system of experience rating, has no interest in active opposition to the payment of unemployment benefits, present experience provides little guide to the nature of a truly adversary proceeding in which an employer actively opposes a claim of unjustified dismissal, and its logical corollary, a demand for reinstatement.

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[34] See article by the Labor Correspondent, London *Times,* June 20, 1960. The article discussed the International Labor Office's comparative analysis of dismissal procedures contained in the May 1960 issue of the *International Labor Review,* which in turn was a summary of several studies published in various issues of the *Review* in 1959. This conclusion of the *Times*'s Labor Correspondent is certainly an overstatement.

[35] *Guardian,* May 24, 1960.

Nevertheless, there is no doubt that British workers feel at least as strongly as do Americans about their continuing right to a job, and are able to invoke collective action in favor of the individual who loses his without what seems to his workmates adequate justification. At the shop level, shop stewards are unquestionably very sensitive to this endemic element of British industrial culture. Cooper's proposal is evidence that British trade-union leadership, in attempting to maintain discipline, is likely to be forced into a recognition of the problem.

Dismissals for Economic Reasons in Britain

Curiously, widespread concern over what to do about "redundancies" in the particular establishment has been a postwar phenomenon in Britain, though before the war, of course, much attention was given to the problem of unemployment. The "cherished prerogative" of British management to dismiss has traditionally extended to the right both to reduce forces and to select those workers to be separated in the event of reduction. And the official position of the British labor movement has generally been that its proper concern was the development of public policies to assure full employment so that economic dismissals would be rare and result in little loss of income when they did occur. Paradoxically, it was in a period of full employment that plant-level reactions to reductions in force made it apparent that many British workers were not satisfied with alternative job opportunities; they sought continued tenure in the jobs they held. Perhaps this was only an expression of the increased bargaining power of the trade-union movement in a period of high employment, and a change from a sense of the inability to do anything at the plant level in a time of general economic depression. The modification of a dogmatically socialist view of economic problem-solving in the trade unions also opened the way to attempts to find pragmatic short-run solutions.

The traditional view of management is frankly expressed in a memorandum from the secretary of the Engineering and Allied Employers'

National Federation to secretaries of federated associations, dated January 9, 1956, following a change in the procedure agreement cited in note 24 which made "terminations of employment" subject to possible consultation. That memorandum reads in part:

> The possibility of unemployment is of vital concern to all. The anxiety of the Trade Unions to protect their members is right and proper and is understood by all employers.
>
> The engagement of a worker by an employer is the subject of a contract which is a personal matter between the worker and employer. When for any reason, a worker's contract of employment is terminated by either party, the termination of the employment is again a personal matter between the worker and his employer. In the interests of employees and employers it is highly important that this principle should be preserved.
>
> A company must relate its labour force to its requirements. This is a basic responsibility of management which cannot be shared with federated Associations or representatives of the Trade Unions.
>
> In the recently amended Procedure Agreement emphasis is laid on the desirability of joint consultation but it should be noted that there is no special redundancy procedure agreed at national level, and it is not desirable for any management to adopt any procedure which is designed to share the responsibility for decisions on redundancy. The following shows a method by which the principle of joint consultation in its relation to redundancy can be applied.

There follows a list of guides to management action which, paraphrased, advise:

1) That management should inform workers what it proposes to do and why.

2) That men to be made redundant should be given individual notices, and that the list should not be posted in the plant.

3) That workers on the list with reasons for special consideration should take the matter up with the foreman, and may then refer the matter to the shop steward. The steward then may discuss the matter with management in accordance with the company's usual custom.

4) That though management may amend its decision with justification, final decision must rest with it.

5) That the final decision must be made known first to the worker, and only subsequently to the steward if he has been concerned.

Collectively negotiated solutions to problems of reductions in force were not made easier by the strength in the labor movement of the "no redundancies" slogan, which was militantly advanced particularly by Communist and extreme leftist groups. Thus, as engineering employers were insisting on complete managerial freedom, with consultation to mean simply the conveying of limited information to trade unions, the

Amalgamated Engineering Union adopted, in 1957, the following resolution:

> This National Committee declares that compensation is no solution to the problem of "Right to Work" and "Full Employment." Therefore we instruct the Executive Council to conduct a national campaign against redundancy and unemployment and for the "Right to Work." Furthermore this National Committee instructs our Executive Council to issue or cause to be issued, through the District Committee, suitable propaganda material on the question of the "Right to Work."
>
> That where redundancy is threatened we instruct our Executive Council to warn the employers that this Union will move into action to safeguard the livelihood of our members and will demand the "Right to Work" and that the necessary action will be taken to enforce our demands.[36]

The National Committee minutes reveal that the original form of the resolution called for a national stoppage to enforce this demand, and endorsed all action of shop stewards actively resisting redundancies. This portion was supported by the left on the committee, but was opposed by President W. J. Carron.

The following year (1958) the AEU National Committee reaffirmed the resolution, and proposed a national agreement forbidding separations in any establishment until suitable alternative employment had been found, as well as a work-sharing agreement with application of the guaranteed weekly wage.[37] In 1959 the policy was again reaffirmed, and it was resolved that no overtime be worked where redundancy was threatened; that if the overtime ban did not solve the problem, a work week of thirty-four hours with the guaranteed weekly wage applying be adopted; and that in the event of management resistance District Committees be authorized to "insist" on a shorter work week.[38]

Despite these hard attitudes among officials and official bodies both in employer associations and in the trade-union movement, there has been a proliferation of "redundancy schemes" in British industry. Some have been adopted unilaterally by management; some have been adopted by management after consultation with trade unions but without formal agreement; some have been the subject of collective agreement. In addition, in numerous cases, *ad hoc* agreements relevant only to a single incident have been worked out.

The diversity of these schemes is so great that it is difficult to characterize them. The most complex, applicable on an industry-wide basis, are in the nationalized industries: coal, gas and electricity, railroads, and airlines. There is Government participation in a scheme in the cotton textile industry associated with a reorganization and modernization of the industry. Nationally negotiated advisory principles or actual plans exist in the boot and shoe, chemical, hosiery, pottery, rayon, silk, tin box, and furniture industries.[39]

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[36] Amalgamated Engineering Union, *Proceedings of the 39th National Committee*, London, 1957, p. 263.

[37] AEU, *Proceedings*, 1958, p. 270.

[38] AEU, *Proceedings*, 1959. Carron was severely criticized for refusing to apply this policy where the union had overtime agreements. See *Guardian*, May 3, 1960.

Myriad plans, schemes, and policies exist in individual firms. They cover very limited to quite general situations—from what is essentially technological displacement only, to any case of dismissals for reasons outside the control of the worker, that is, reductions in force for any reason. Most provide for at least advance information to and more often consultation with trade unions. Some do not question the right of management to choose dismissals over other possible alternatives; others provide for elimination of nonessential overtime and/or consideration of the reduction of the work week, intraplant or intrafirm transfers, reduction or elimination of new hires, reduction of subcontracting, and the like.[40]

If separations are determined upon, there are several frequent practices with respect to the selection of employees to be dismissed. It is often stated in Britain that seniority is the primary basis of selection. But, as Roberts says, "The principle of the last man to be employed to be the first dismissed is often used in Britain, but this is generally a matter of custom and practice rather than (as compared with the U.S.) the result of carefully worked out and often highly complex systems of seniority rules."[41]

Often the basis of selection is not written but merely understood. Trade-union leaders have described informal systems, not untypical, which provide that foreign workers, if any, are first to be dismissed.[42]

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[39] See Ministry of Labour, *Security and Change*, p. 15; Geoffrey Goodman, *Redundancy in the Affluent Society*, Fabian Tract 340 (London: Fabian Society, 1962), p. 13.

[40] For analyses of the provisions of British redundancy schemes see Acton Society Trust, *Redundancy, A Survey of Problems and Practices* (London, 1958); Ministry of Labour, *Security and Change;* Goodman, *op. cit.* The description below is based on these sources, examination of a number of individual plans and surveys of plans, and interviews.

[41] B. C. Roberts, *Trade Unions in a Free Society* (London: Hutchinson, 1962), p. 14.

[42] This kind of provision is fairly typical of the attitude of many British workers to foreigners. An interview with an official of the iron and steel union uncovered a case in which the workers had protested the failure to include in a layoff list certain Italian workers. The agreement, negotiated after the war when, by agreement with the union, Italians were brought in, provided that in cases of redundancy they would go first. However, the Italians in question had advanced in line of promotion because of the refusal of native workers to accept promotions. Upon insistence of the union, they were kept and the agreement provision scrapped.

See also Report of W. J. Carron, President and pro tem. General Secretary to Executive Council, Amalgamated Engineering Union, Jan. 28, 1957. President Carron, Married women frequently come second. Then seniority, modified by considerations of individual hardship, determines the order. As indicated above, employers may attempt, often successfully, to introduce such considerations as "bad timekeeping" (tardiness and absenteeism), general records of poor discipline, and relative skill and efficiency.

An analysis of formal policies in 236 private firms showed, among those specifying criteria, the following distribution:

(a) 40% specified a combination of efficiency and length of service.
(b) 17% specified seniority only.
(c) 3% specified efficiency only.
(d) 40% specified categories of employees who would be the first to go, e.g., employees over the normal retiring age (more than half), part-time workers, and married women.[43]

The same source indicates that the policies sometimes provide for special consideration of hardship cases.

In both formal and informal systems, it is frequent practice for the employer to draw up the initial list of employees to be separated. The list then is turned over to the shop stewards, who are given an opportunity to protest or appeal the inclusion of individual workers on such grounds as might seem to them to be appropriate. In some cases, shop stewards refuse to have anything to do with this process, maintaining the position that there should be "no redundancies." In others, they seek to protect workers for whom separation would be a special hardship—elderly workers, those with many dependents, and the like—or attempt to maintain principles of seniority or to identify cases of alleged victimization.

Shop stewards are, of course, placed in a difficult position when called upon to act on such proposed lists. In effect, they are asked to choose among their constituents which shall retain and which shall lose a job. Naturally, the formal action is never put in these terms. The shop steward simply protests the inclusion of a particular individual on the list; he does not indicate that compliance with his request implies the selection of a substitute for dismissal. But this is the ordinary consequence. This may be the reason why at least some shop stewards fall back on the "no redundancy" slogan, refusing to have anything to do with the selection process.

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reporting on a survey of redundancy practices through a questionnaire to AEU district secretaries, said: "Age features in some of the methods adopted by Employees in selecting redundant personnel, workers over 65 being among the first to be laid off. In a number of firms foreign nationals and dilutees are also given top priority for redundancy notices, and it is usually at this stage of the laying off procedure that the principle of 'Last in–First out' is adopted."

[43] Ministry of Labour, *Security and Change*, p. 8.

On the other hand, British workers and their shop stewards seem less determined to enforce any fixed rule, including seniority, than their American counterparts. Many unionists expressed the view that seniority in the plant or with the employer seemed to them less important than length of service in the trade or industry, or length of union membership. A letter from the files of a large British union is fairly typical:

> . . . I must point out that this District have never agreed with "last in–first out." We consider such a policy would be a retrograde step because it results in some poor individuals, in particular the active trade unionist, always being pushed out of a job. The man who has worked in a number of establishments has given equal service to the industry and the needs of the community as the man who has remained in one workshop all his life. Furthermore, membership of the Union should be a better criterion for a job than service with a particular firm. The man with the longest service in a firm may have the shortest membership in the Union, whilst the man who was last to start may have the longest Union membership.

Ordinarily, the employer retains the right to make the final determination of the composition of the redundancy list, though he risks a strike or other form of protest if he does not heed the advice of the shop stewards, or, perhaps, even if he does. Once the list is decided upon, there may be other formally or informally understood procedures. Many companies have a practice of long advance warning to affected employees, distinguished from notice in that failure to give warning does not open the employer to liability for pay in lieu of the warning. In addition, many companies agree to give formal notice (or pay in lieu) longer than the traditional or customary period. In some instances this long notice is specially applicable to cases of redundancy; in others it is applicable to all separations except those in which the employer is willing to charge misconduct. Among some British firms there has been a movement in recent years to give "staff status" to manual workers,[44] meaning that their terms of employment, particularly including notice periods, are made to resemble more closely those of white-collar, office, and supervisory personnel. In numbers of firms, the agreed notice is graduated with length of service.

Of the 236 private firms surveyed in the Ministry of Labour study, 67 provided for formal notice in excess of the usual week, in cases of redundancy. In 42 of these 67, the long notice was of fixed duration; in 25 it was graduated in accordance with length of service. A typical plan of the latter type provided:

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[44] See Acton Society Trust, *Redundancy*, p. 32.

> When it is necessary to make employees redundant notice will be given to them on the following scale:—

Up to 6 months' service	1 week's notice
6 months' and up to 3 years' service	2 weeks' notice
Over 3 years' service and up to 5 years' service	4 weeks' notice
Over 5 years' service and up to 10 years' service	5 weeks' notice
Over 10 years' service	Each case to be considered on its merits but not less than 5 weeks' notice

> Depending upon the circumstances prevailing at the time, the Company will decide whether the people will work their notices or be paid money in lieu.[45]

In addition to long warning, lengthened notice, or pay in lieu of notice, many British firms have introduced severance pay arrangements. Of the 236 firms in the Ministry of Labour study, 93, mostly large ones, had severance pay arrangements. Seven of these 93 had provisions both for extra warning and for formal notice in excess of the customary one week. Another 23, though having no provision for extra warning, provided also for long formal notice.[46]

The typical severance pay arrangement provides for amounts graduated with length of service. Severance pay may be given in a lump sum or, less commonly, in the form of weekly payments. In some firms, indeed, the established policy is to make the amount *ex gratia*. The size of payments varies considerably. Table 2 summarizes the amounts of severance pay given in the firms studied by the Acton Society Trust.

Finally, at least some schemes provide for priorities in rehire of former employees made redundant. In contrast to the situation in the United States and Mexico, where such commitments, when collectively negotiated, have formal means of enforcement, in Britain they amount to no more than moral obligations. The collective agreement has no direct legal effect, and since no vestige of the individual contract of employment remains after separation, the unilateral promise is unenforceable.

Of course, in small-town industry, former workers are rehired without establishment of a formal policy, at least when layoffs are of short duration. Indeed, one major shipbuilding firm, operating in an isolated area, said that the major deterrent to short-term separations was the fear of dissipation of the labor force.

But in the larger cities, one senses that rehire policies are not carefully observed. Indeed, the personnel director of a major aircraft firm with a written rehire policy could not say by what procedure this policy was

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[45] Ministry of Labour, *Security and Change*, pp. 9–10.

[46] *Ibid.*, Appendix Table II-B.

TABLE 2

Severance Payments in Selected British Firms

Amount of dismissal pay	Agreements providing dismissal pay after:					
	1 year	5 years	10 years	15 years	20 years	25 years
All agreements	174	262	266	266	266	266
No dismissal pay	92	4	...	...	...	...
Less than 1 week	7	1	1	1	1	1
1 week	111	10	4	3	3	3
More than 1 week, less than 2	2	...	...	1	...	...
2 weeks	24	37	27	23	20	20
2½ weeks	...	5	...	...	...	...
3 weeks	6	22	7	11	13	13
4 weeks	4	7	18	5	6	5
4½ weeks	1	...	...	...	...	...
5 weeks	...	66	2	2	1	2
6 weeks	...	80	2	2	2	1
More than 6, less than 8	...	2	17	11	...	...
8 weeks	...	...	50	50	51	49
More than 8, less than 10	...	...	2	1	11	1
10 weeks	...	7	28	4	5	5
11 and less than 15	...	2	19	21	4	17
15 weeks	...	...	19	23	...	...
16 and less than 20	...	...	16	1	21	...
20 weeks	...	...	28	1	25	3
21 and less than 25	...	...	3	17	15	2
25 weeks	...	...	...	...	...	22
26 and less than 30	...	...	...	6	...	...
30 weeks	...	...	...	13	...	15
31 and less than 40	...	...	...	23	15	...
40 weeks	...	...	...	13	4	...
41 and less than 50	...	...	...	11	15	1
50 weeks	...	...	...	...	8	4
51 and less than 60	...	...	...	...	16	23
60 weeks	...	...	...	...	24	4
61 and less than 70	...	...	...	...	1	1
72 weeks	...	...	...	...	...	7
72 and less than 80	...	...	...	...	...	40
80 to 100 weeks	...	...	...	...	1	4
Other	19	23	23	23	23	23

For all agreements for which compensation could be computed, the average tended towards a week's pay for each year of service up to the 15 year mark. At 20 and 25 years, the allowance, on the average, was established at a somewhat higher ratio. Thus:

Length of service	Average dismissal pay (in weeks[a])
1 year	0.8
5 years	4.6
10 years	10.0
15 years	16.4
20 years	24.0
25 years	30.7

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[a] A week is counted as five days.

Source: Acton Society Trust, *Redundancy; A Survey of Problems and Practices* (London, 1958), I, 49-50.

implemented. Furthermore, those firms which use reductions in force to rid themselves of unwanted individual workers obviously do not permit a policy of rehire priorities to bring these former employees back.

In a few firms former employees rehired retain, under certain conditions, the privileges which attach to length of service, cumulating the two or more periods of service. However, since seniority is of less importance for layoff, promotion, and job assignment purposes than it is in the United States, such provisions are less of an inducement to the worker to return.

The great agitation over redundancy in the postwar period has apparently led to the development of policies to deal with the problem in many firms. Since the trade-union movement has too often had its hands tied by the inflexibility and appeal of the "no redundancies" slogan of the left, relatively few of these policies are truly collectively negotiated.[47] In the initiation of the plans and the formulation of their provisions management has at least formally retained a very large area of discretion.

Inquiries were made, then, of managements and others associated with the development of redundancy schemes, and of those who had studied the problem, to obtain some insights into the reasons for the new policies. In many instances, schemes were introduced simply because such matters were "in the air." That is, many firms were simply following what they saw as a trend. In other instances, the introduction of redundancy policies seems to be a modern expression of a traditional paternalism characteristic of a large segment of British industry. Although in these cases the terms of the policies were often among the more generous, the philosophy was essentially one of assistance to workers, rather than an externally or self-imposed financial deterrent to reductions in force, or an expression of an obligation to buy out a worker equity.

But a great number of firms (and industries where there was a bargained industry-wide policy) were quite frankly responding to pressure from the community at large and from workers. Job security issues represented by redundancies and disciplinary dismissals are, after wage issues, the most sensitive area of British industrial relations.[48] Since many wage strikes, though certainly far from all, were officially sanctioned by the trade unions, redundancies and dismissals represent an even greater factor in the knotty problem of "unofficial" strikes. It was to these kinds of pressures that a great many firms were reacting when they established redundancy policies.

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[47] In many cases, though the plan is not the subject of collective agreement, the union was consulted in the later stages of its formulation and tacitly accepted it or at least agreed not to oppose it.

[48] Such issues have been the most important cause of strikes next to wage matters in recent years, if coal mine strikes over other forms of discipline and rules are eliminated. See the annual analysis of work stoppages published in the Ministry of Labour *Gazette*.

Disturbances over redundancies and dismissals and unofficial strikes in general generated considerable discussion over possible changes in public policy to deal with the problems. Perhaps unfortunately, the two problems got mixed for reasons rather special to Britain. Proposals to deal with job security often took the form of longer formal notice. But a worker who strikes without notice is at least technically in breach of his contract of employment. Consequently, provision for long notice, provided it was reciprocal, could serve both as a means of cushioning the shock of separation from employment (other than for valid reasons of misconduct) and as a deterrent to sudden strikes. And, because it would serve both these purposes and because the notion of reciprocity is deeply ingrained in the law of British employment relations, proposals to lengthen periods of notice as a matter of public policy almost invariably made the longer notice reciprocal.[49]

For several years, suggestions have been advanced, generally from Liberal or Conservative sources, that the law require a specific period of notice in contracts of employment. The Conservative Government put up a number of trial balloons in this direction.[50] In 1960 four Conservative back-benchers tabled a motion providing that "in order to cement industrial goodwill, legislation is required to render compulsory after one year's service, one calendar month's contract between employers and employed, breach of such contract to make a party to it liable for a claim for consequential damages at law. . . ."[51] This motion did not receive Governmental support.

However, on December 11, 1962, the Government introduced a "Contracts of Employment Bill." It would have provided a minimum period of notice of two weeks for employees with continuous service of more than two years but less than five, and of four weeks for employees with continuous service of five years or more. The only exemptions were in the dock and merchant shipping industries, which operate under special legislation.

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[49] It should be noted that private provision for long notice, or at least warning, is not always reciprocal.

[50] See Roberts, *op. cit.*, p. 15. In a Ministry of Labour pamphlet, *Positive Employment Policies* (London, 1958), p. 6, emphasis is placed on the desirability of "a genuine *Contract of Service* involving rights and obligations on both sides." Conservative Party consideration goes back to the "Industrial Charter" of 1947, a campaign document.

[51] *Guardian*, March 31, 1960.

The proposed statute would have required reciprocally equal notice of the employee.[52] It provided, further, that continuity of service would be broken by participation in a strike of which notice, specified in the statute for employees of two classes of length of service, was not given "by or in behalf of" the employee.

As finally enacted, the Act provides no interruption of continuous service for employees who strike, "except where the employee has, in taking part in the strike, broken his contract of employment." According to British legal experts with whom this provision was discussed, it is so ambiguous as to require considerable clarification by litigation.

The first reaction to the bill by an important organized employer group appeared in a bulletin of the British Employers Confederation, which characterized it as "a poor contribution by the Government to National Productivity Year." It would require great additional administrative effort on the part of employers, its definitions of continuous service were unclear, it might do little to solve the problem of unofficial strikes, and "it appears to be of little, if any positive benefit to any employee."[53]

The initial reaction of the Trades Union Congress, at least as expressed in its journal and by the general secretary, was equally unenthusiastic.[54] In interviews with trade unionists before introduction of the bill, but after considerable public discussion of its possibility, many found legislation on the subject impossible since they could not conceive of reciprocally unequal periods of notice. It therefore followed, in their view, that the advantage of long notice periods was offset by the equivalent liability of workers. The bill, however, was criticized for adhering to the principle of reciprocity, and attention was called to continental legislation providing that longer notice be required of employers than of employees.[55] The benefits were considered to be minimal as compared with effective severance pay possibilities.[56]

At the base of British union objections, probably, were the strike-regulatory features of the bill. Though the official movement deplores the widespread incidence of "unofficial" strikes, at which the bill was aimed, and may be deterred from making this an overt issue of controversy, it must be extremely uneasy over the introduction of the principle of legal regulation of trade disputes, even though here the sanction is most mild. It consists merely of interruption of service for purposes of computing eligibility for long notice.

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[52] See "Explanatory Memorandum" accompanying the bill, para. 1.

[53] *Guardian*, Dec. 22, 1962.

[54] *Ibid.*, and *Labour: The TUC Magazine*, Jan. 1963, p. 6.

[55] *Labour, op. cit.*

[56] *Ibid.* Also see London *Times*, Dec. 15, 1962. The story there reports an attack by the Association of Supervisory Staffs and Technicians, a left-wing union, whose views on this subject, however, are probably generally shared.

As indicated above, the bill was passed, though with considerable change. The strike-regulatory aspects were made, at the least, ambiguous. The notice required of employers was modified to require not less than a week's notice for employees with more than twenty-six weeks but less than two years of service, in addition to the notice requirements in the original draft for longer-service employees. But perhaps the most striking change, from the point of view of this analysis, was that requiring a minimum of only one week's notice from employees with more than twenty-six weeks of service. Thus, the traditional notion of exact reciprocity expressed as equal mutual periods of notice in the original bill was rejected. As was said in the debates, the *quid pro quo* for the long notice required of the employer is not equal notice, but the simple fact of long service from the employee.[57]

However weak, unsatisfactory, and ambiguous the Contracts of Employment Act may be, it is evidence of substantial concern over the problem of insecurity in employment, and proposes a first, hesitant step toward recognition that solutions in the way of unemployment compensation, full employment policies, and the rest of the traditional legislative baggage are insufficient. In Britain, where the principle of legislative restraint in interference with private contractual relations is most pronounced, it is of particular interest. After all, the last legislation dealing with the general terms of service was passed in 1875 and had as its basic purpose the establishment of contractual equality. Most subsequent legislation of importance, other than social insurance or trade-union matters, dealt with protection of women and children, safety laws, and regulation of special industries such as the docks, merchant marine, and coal mines. Only the truck acts and minimum wages legislation dealt generally with matters usually the subject of individual contracts, and even the minimum wages legislation is exceptional in its application.

There can be no doubt that British industrial society and its culture give strong evidence of the development of a deep-seated notion among workers that jobs belong to them and that they are not to be deprived of them arbitrarily, nor are the jobs themselves to be destroyed without regard to their established equities. As is so often the case in Britain, one must look behind the formal institutions to find expressions of these attitudes and evidences of practices which effectuate them. Yet the strains produced between the attitudes and the inability of formal institutions to adapt to them have become so clear that it seems almost inevitable that change will result in the institutions. The Contracts of Employment Act is only one expression. But collective bargaining mechanisms, the content of collective agreements, and perhaps even their status may change under these evident pressures.

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[57] See *Parliamentary Debates,* Commons (Hansard), Feb. 14, 1963, p. 1572.

Chapter 3

France: The Primary Role of Law

ABUS DE DROIT: THE EVOLUTION OF A LEGAL CONCEPT

The French Revolution overturned finally the remnants of the medieval system of work and employment relationships. In their place the Napoleonic Codes established a formal system in which all rights and obligations were to be determined by law and by contract freely entered into. Describing itself as a liberal system, it set forth the basic tenet that within the framework of law, individuals were to be free to make whatever bargains they could and wished, unlimited by either private regulation or association. Nothing was to stand between the citizen and the state, and each citizen was to stand at arm's length from another in determining at what occupation he might work or whom he might employ, and on what terms. Early legislation attempted to abolish what was left of the guilds and their rules, and made conspiracy or combination an offense against the state.

Contracts to work or to hire were largely undifferentiated from other kinds of contracts; in general the rules of contract law enunciated in the Civil Code applied to contracts of work in the same fashion as to contracts for the purchase and sale of merchandise. There were only two specific exceptions, contained in Articles 1780 and 1781 of the Code.

Article 1780, designed to prevent slavery or peonage, provided that one could not sell one's services except for a specific period or to a specific employer. A corollary to this article was Article 1142, which provided that an obligation to act or refrain from acting could be resolved only by damages—a French counterpart to the Anglo-Saxon doctrine forbidding the courts to require specific performance of contracts of personal service.[1] As Brun and Galland remark,[2] the authors of the Civil Code, tracing their thought back to Roman concepts, did not otherwise (except for Article 1781 discussed below) distinguish between a contract of employment and a contract for the hire of a material object. And, as Durand observes,[3] though the sources were different, British law at the end of the eighteenth century produced a similar integration of the law of contracts for personal service with the general law of contract.

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[1] See Rapport du Citoyen Mouricault, Séance du 14 Ventose, an XII, in *Recueil des Lois Composant le Code Civil* (Paris: Chez Rondonneau, 1804), VII, 197. Reporting for his section, Mouricault remarks that it is necessary to consecrate the principle of individual liberty once more in Article 1780. "Il résulte encore du principe cette conséquence, que l'engagement, s'il n'est pas exécuté, se résout en dommages et interêts."

[2] *Droit du Travail* (Paris: Sirey, 1958), p. 25.

The consequence of this failure to distinguish was that all the maxims of contract law concerning symmetry and reciprocity were read into employment contracts. The parties, in their relationship to each other, were regarded as legally equal, with the exception noted below. Within this context there was no room for any notions of extracontractual legal obligations on the part of the employer to continue or to renew the relationship. Given the right of the employee to leave the service of his employer, the contractual concepts of reciprocity and equality reduce to the maxim that the employer has the free right to terminate the relationship when and as he wishes.[4] Though this rule did not receive explicit statutory recognition until 1890 when the Law of 27 December declared that "the hiring of services for indefinite term can always cease at the will of one of the contracting parties," this was said at the time of passage to be a reconfirmation of long-standing jurisprudence. In fact, the legislation of 1890 marked a step toward contemporary concepts of extracontractual responsibility in that it provided a sanction against unilateral termination under certain circumstances.

The notion of reciprocity has historically been apparent in the application of Article 1142 forbidding specific performance. Though the article was justified as a means to prevent slavery or peonage, in practice it has meant not only that no individual could be required to work for another, but also that the employer could not be required specifically to continue in his employ an employee whose contract he had breached. Reinstatement as a remedy for a breach of contract by the employer has been unavailable to French courts, since this "obligation to do" can be remedied only in the same way as the employee's obligation—by money payments.[5]

The second exception distinguishing contracts of personal service—the exception to legal equality of the contracting parties—was contained in Article 1781. It provided that in disputes between masters and workmen over the amount of wages to be paid or actually paid, the master was to be believed on his affirmation. No exception was to be made, even if the workman could produce witnesses; the legislators rejected even this concession on the ground that it might produce fraudulent collusion.[6] Thus, while the same principles of contract law applied to each party to the contract of employment, the master was given exclusive credibility in the matter of proof of his execution of the wage terms.

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[3] *Traité de Droit du Travail* (Paris: Dalloz, 1947), I, 67.

[4] See G. H. Camerlynck, "De la Notion Civiliste du Droit Contractuelle de Résiliation Unilaterale à la Notion Statutaire de Licenciement," *La Semaine Juridique*, 1958, p. 1425.

[5] See *Recueil Dalloz*, 1916, I, 286.

The Law of 22 *germinal an* XI, providing for the famous *livrets,* also gave to the employer a marked practical advantage. It provided that each worker must have a work book, which was to be deposited with his employer, who could hold it as a guarantee against wages advanced. Since the worker could not obtain new employment without the *livret,* it placed a powerful weapon in the hands of unscrupulous employers. The *livret* "could become an instrument of servitude."[7]

The Law of 2 August 1868 repealed Article 1781 of the Civil Code, thereby establishing complete formal equality of employers and employees in the matter of proof in individual wage controversies. With the exception, then, of the *livrets,* justified as a police measure to prevent vagabondage, and excepting Article 1780, contractual relationships between employers and employees became completely analogous to ordinary contracts concerning merchandise. The only special provision relating to employment was Article 1780 forbidding peonage. In the eyes of the law, reciprocity and symmetry were complete.

Though Revolutionary legislation had wiped out the quasi-legislative power of the guilds and other private societies, and the Napoleonic Codes had affirmed the supremacy of statutory law, many of the practices of the guilds had survived as matters of custom.[8] In particular, though contracts of employment, in France as in the United States and Britain, were often oral and usually sketchy, in many older occupations the custom had survived of requiring mutual and reciprocally equal notice of termination of contracts of indefinite term. In new trades, and especially the railroads, such custom, of course, did not carry over from pre-Revolutionary times. Where it did continue, it was always understood that the commission of a serious offense by either party justified immediate termination of the employment relationship. This qualification, naturally, was most relevant to the employer, who might use summary discharge as a disciplinary measure.

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[6] Durand, *op. cit.*, I, 67.

[7] E. Levasseur, *Histoire des Classes Ouvrières en France* (Paris: Hachette, 1867), II, 286. In general, however, Levasseur thought *livrets* desirable. See pp. 332–33.

[8] See A. Rouast and P. Durand, *Précis de Législation Industrielle* (Paris: Dalloz, 1948), p. 39.

From 1859 to 1890, and indeed continuing thereafter, there developed a lively legal and political controversy over the status of these customs and over the desirability of providing some kind of job protection to railroad employees, for whom customary protections did not exist. The controversy turned around the application of two sets of provisions of the Civil Code, both of which were of general application: Articles 1382 and 1134, and Articles 1156 and 1135.

Article 1382, providing that whoever causes injury to another can be required to make reparation, had been generally interpreted to mean that as a corollary no one could be held liable for an injury caused in the exercise of a right. Employers, therefore, argued that since Article 1780 gave the right of unilateral termination of employment contracts, damages for the exercise of the right of termination could not be supported. This position was buttressed by reference to Article 1134 providing that the contract is the law of the parties.

Article 1156 provided that contracts should be construed in accordance with the intent of the parties, rather than by literal reading of the terms. Article 1135 provided that contracts bind not only as to their explicit terms, but also as to all the consequences flowing from equity, custom, or law upon the obligation, in accordance with its nature. In employments where the custom of notice prevailed, employees argued that this custom was intended by the parties to be included in the contract, and that employers who failed to observe it should be held liable. Further, it was argued in many employments that custom required indemnification for loss of employment apart from mere notice. In the early period, no clear distinctions were made between payments in lieu of notice[9] and damages for what later was called *abus de droit*—abusive exercise of the right to terminate a contract of employment.

It was within this legal framework that the courts worked to solve the controversies growing out of a changing society. In general, the special labor courts, with their nonprofessional judges elected by and from employers and employees, and the lower general courts recognized and yielded to pressures to provide employees some protection against the arbitrary and unhampered exercise of the right of employers to terminate contracts of employment unilaterally. After some initial hesitation, the Supreme Court (*Cour de Cassation*) adopted a firm stand that while employees might, in accordance with the terms of a contract, be entitled to pay in lieu of notice, no one could commit a tort in the exercise of a right, and no damages beyond pay in lieu of notice might legally be awarded.

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[9] It may be that in some trades custom provided separately for notice and, in the case of long-service workers, for *indemnités de licenciement*, i.e., a form of severance pay. Many of the early court decisions fail to make clear what the nature of the custom was.

The early Supreme Court case which had seemed to give support to the reasoning of lower courts involved a professional employee of the Opera who was dismissed allegedly for committing various serious offenses. There was some controversy in the courts over the applicability of certain rules of the employer allegedly providing relief in such cases, but the decision ultimately referred not to these rules, but to other considerations. It held that a contract of indefinite term, while it could be unilaterally terminated, could not be broken suddenly and in prejudicial fashion. If it were, the courts might award damages to the plaintiff employee in accordance with the circumstances, including the kind of services rendered, professional custom, and the necessary conditions of the industry or art. The Supreme Court affirmed the award of one year's pay as damages, holding that this appeared to be consistent with usage of the profession and that no facts were alleged to justify derogation from this custom.[10]

Following this kind of reasoning, lower courts began to hold that even if termination was for good economic reason (though not for personal cause), dismissed workers were, in accordance with the rule of equity, entitled to notice or indemnity. This was not a penalty upon employers, said the *Cour de Lyon,* but the means to provide living expenses during the search for new employment. The amount of indemnity varied according to the trade, it being "universally admitted that for persons of the humblest state, such as domestics," a sum equal to eight days' wages was appropriate, while for others it might range up to a year.[11]

The *Cour de Rouen,* while upholding a discharge without notice as justified in the case at hand by the misconduct of the employee, observed that a worker is entitled to damages if fired maliciously or without cause.[12] Unlike the Lyon case, in which the court relied on custom as an implied term of the contract, the Rouen court based this dictum on Article 1382, construed to admit the possibility of commission of a tort in the exercise of a right.

While these and other lower courts were following the lead of the 1859 decision of the Supreme Court, that court was moving back to a strict construction of mutual contractual relationships. In an 1865 decision involving a journalist, the judges used what became classical language in construing Article 1382—no one commits a tort in the exercise of a right—in overturning a lower court decision granting damages to the dismissed employee. The Court added that the parties were on a basis of equality since the employee could not be forced on pain of damages to continue in his employment.[13] It might be noted that the *Cour d'Orléans,* to which the case was remanded, awarded the plaintiff damages, this time on contractual grounds, holding that the custom of the trade was implicitly incorporated in the contract and supported a damage award.[14]

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[10] *Recueil Dalloz,* 1859, I, 57.

[11] *Ibid.,* 1873, II, 33.

[12] *Ibid.,* 1861, II, 52.

In the 1870's and 1880's a great number of railroad dismissal cases came before the courts. These are of particular interest, first, because they illustrated the problems of newer industry unencumbered with tradition, and, second, because these problems led to movements for legislative action culminating in the Law of 1890.

Illustrative of the conflicts between the reasoning of the lower courts and that of the Supreme Court is an 1874 case involving a railroad which had dismissed an employee with two weeks' pay in lieu of the notice provided for in the written rules of the company. He had been awarded damages of an additional 1000 francs under Article 1382 on the ground that he had been discharged suddenly and without adequate cause. The Supreme Court held that Article 1382 had been misconstrued, that its corollary was that no tort could be committed in the exercise of a right. The lower court's award had been in part an effort to reimburse the employee for wages withheld for contributions to a company welfare fund. The Supreme Court ruled that since the regulations of the fund clearly stated that contributions could not be returned, the award was forbidden by Article 1134: the contract is the law of the parties.[15] This matter of employee contributions to welfare funds was one of the major issues in controversy during the legislative discussions.

Prior to the Law of 27 December 1890, then, everyone concerned was agreed that employees were entitled to whatever a contract might provide. The lower courts were more willing than the Supreme Court to read into contracts an intent derived from custom or equity within the meaning of Articles 1135 and 1156 of the Civil Code. On the other hand, as time passed, the Supreme Court relied more heavily on a literal reading of the terms of the contract and on Article 1780 giving the parties to contracts of service the right unilaterally to terminate them—

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[13] *Ibid.,* 1865, I, 40.

[14] *Ibid.,* 1865, II, 128.

[15] *Ibid.,* 1874, I, 65; see also 1874, I, 304; 1875, I, 198.

to "resume their liberty." While agreeing that the employer had the right to terminate the contract, the lower courts read Article 1382 to mean that if he did so without sufficient cause or maliciously, he could be called upon to make reparations. The Supreme Court, however, emphasized the corollary of Article 1382 that no one could commit a wrong merely by exercising a right.[16]

Beginning in the early 1870's there was considerable legislative sentiment for the granting of special job protection to railroad workers. This seemed founded on the special character of railroad employment in that highly developed skills were so unique to the industry as to create an inequality in bargaining power in dealing with an employer "'who is not a human being, not an individual. It is merely a fictitious person, a legal creation.'"[17] In selecting railroad employment workers necessarily limited their future to the industry. Yet in the absence of custom like that giving protection in other industries of lesser need, the courts were merciless in permitting their discharge without recompense.

Various legislative measures introduced in the 1870's failed. In 1881 a bill was introduced in the Chamber of Deputies providing that contracts of employment for permanent railroad employees could be dissolved only by mutual consent or for legitimate reasons approved by a special board of arbitration. A public agency was to define what constituted proper cause for dismissal. A conservative substitute which would have made a minor revision in Article 1780 barely failed. Invoking the principle of equality before the law, it would have substituted some general reform for the special railroad legislation.

Though the Chamber of Deputies passed several railroad measures in the eighties, the Senate did not act until 1888, when it returned to the Chamber, in lieu of the railroad legislation, a general reform of Article 1780 substantially in the form finally adopted as Article I of the Law of 1890. The issue in Parliament during the debates on the bill lay between the conservatives, who opposed any real breach in the principles of free contract, individualism, and continued general application of the concepts of the Civil Code, and the moderates combined with the left, who were primarily concerned with what they considered the inapplicability of these principles to the railroad situation. Some of the latter, perhaps, had a mistaken view of the legal rights of workers generally and so were not greatly concerned with general reform. What they sought was to put railroad workers on the same legal footing with others, but they probably misconstrued general law as following the 1859 decision of the Supreme Court. This precedent had been greatly modified in succeeding years.

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[16] See Planiol, note to *Recueil Dalloz*, 1897, I, 40. See also his note to *Recueil Dalloz*, 1892, I, 585, and Paul Pic, *Traité Élémentaire de Législation Industrielle: Les Lois Ouvriers* (5th ed.; Paris: Rousseau, 1922), p. 833, where both argue that in addition jurisprudence held that damages might be awarded in event of a noncontractual wrong. Planiol is probably referring to lower court decisions. Pic, however, is not. At least two of the three cases he refers to, *Recueil Dalloz*, 1875, I, 198, and 1887, I, 410, do not seem to support his view.

[17] *Journal Officiel*, Chambre, Documents, Annexe 1372 (Séance du 29 Décembre 1888), Rapport Poincaré, pp. 811–26.

This objective, with its view of the law, was expressed by Deputy Floquet in describing the purpose of the bill. He stated that "for the railroads as is the case for other industries, the right of employees to remain in the industries in which they have conscientiously worked until a serious offense, inability, demonstrated insubordination, or serious necessity obliges the employer to dismiss them should be made to prevail before the courts."[18]

The result, of course, was a compromise. Article I of the Law of 27 December 1890 provided that services for indefinite term could always be ended at the instance of either of the contracting parties. Nevertheless, the law continued, termination of the contract by one of the parties might give rise to damages. In assessing damages, account was to be taken of usages, the nature of services, length of service, contributions made or withheld toward pension funds, and, in general, all the circumstances which determined the existence and extent of injury. The parties could not renounce in advance their right to damages under the article. These provisions were added to Article 1780 of the Civil Code. In addition to this general reform, it was specifically provided that the railroad companies had to submit for ministerial approval the rules of their pension and welfare funds.

Thus ended twenty years of political agitation to give French workers greater security against arbitrary dismissal. Though the greatest resentment was directed against treatment of railroad workers, this was only because many parliamentarians misconstrued the jurisprudence of the Supreme Court. Unfortunately, a legislative history was built which lent itself to the interpretation that the 1890 legislation, for workers generally, only confirmed existing judge-made law. The intent, at least of the majority of the Chamber, undoubtedly was to confirm the law of the more liberal lower courts. For railroad workers one significant advance was made, in controlling abuses of pension funds.

Quickly a whole series of important issues under the statute arose, issues whose determination in the courts decided the real impact of the law on worker security. The first and most fundamental group of problems concerned the circumstances under which damages would be awarded. Would they be due in any case in which the employer had no "just cause" for dismissal, or would they be limited to cases in which, in the process of exercising his right to terminate the relationship, he committed some wrong beyond the mere fact of dismissal without adequate cause? And if it were the latter, as it turned out to be, how was this wrong to be established?

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[18] *Journal Officiel,* Chambre, Débats Parlementaires (Séance du 20 Décembre 1882), p. 2094.

Subsidiary problems involved such questions as the legal priorities of explicit or implied terms of the contract as against custom and usage. For example, where customs concerning notice were longer than might be provided for in contracts or shop rules, did the prohibition against renunciation extend to such waivers of customary notice? And could employers escape liabilities under the law by transforming the customary contracts of indefinite term in many trades into daily contracts of limited term?

It seems doubtful that the manual industrial worker gained much from the legislation of 1890, though some professional and white-collar employees may have benefited more substantially. The statute cleared up at least one ambiguity in the law—it made specific the right to damages other than pay in lieu of notice, though the circumstances under which these were to be awarded remained uncertain.

It quickly became clear that so far as the Civil Chamber of the Supreme Court was concerned, a dismissed worker was not automatically entitled to compensation other than possible pay in lieu of notice if he were dismissed without what would in American terminology be called "just cause." The interpretation of the Civil Chamber was that the law did not impair the fundamental right of the employer to dispense with the services of an employee for any or no reason. It was, therefore, always presumed that the employer had committed no fault in the exercise of this right. His failure to show "just cause," then, did not automatically make him liable to damages under the law. For damages to be awarded, he must have committed some affirmative wrong. Furthermore, it devolved upon the plaintiff to show that wrong. It was not enough for the employee to show that the reason given by the employer for a dismissal was not grounded in fact; he had to show in addition that the employer had committed a tort in the exercise of his right to separate from his service an employee he no longer wished to keep.[19]

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[19] See Analysis of Avocat-Général Rau in connection with *Recueil Dalloz,* 1895,

The *Chambre des Requêtes* of the Supreme Court, in the minority of cases assigned to it,[20] took a different view of the question of burden of proof. In a number of cases it held, for example, that the mere fact of summary dismissal was an actionable wrong since it damaged the reputation of the employee.[21] In others, it held dismissals abusive when the reason given by the employer was, in its view, insufficient;[22] and dismissal for absence on account of illness could be a wrong.[23] These cases, however, must be regarded as outside the main line of jurisprudence. After 1928 the *Chambre des Requêtes* fell in line with the view of the Civil Chamber.

The second important section of the Law of 1890, after legislatively affirming in general the doctrine of abuse of right as applied to employment relationships, provided guidelines for the courts in assessing damages. Initially, certain of the lower courts misinterpreted these provisions to describe conditions that might create the existence of an abuse, for example, dismissal of a long-service worker. It quickly became clear that the wrong had first to be proved. Then, having proved this, the dismissed employee had to show the existence of actual injuries. These were exemplary criteria of the extent of damages only.

On the question of the import of the prohibition against waiver of damages and the related issue of priorities of custom and contract, the Supreme Court showed its continued adherence to traditional conventions of the law relating to private contracts. It held, probably quite consistently with legislative intent, that the prohibition of waiver applied only to damages that might result from abusive dismissals—the parties could not agree to waive damages for the tort. However, it was regularly held by the Supreme Court that the parties could derogate by contract from the customary periods of notice and that this did not constitute a void waiver.[24] Furthermore, it was held consistently that, with rare exceptions, for example, if the rules were not known to the employee,[25] the posting of shop rules containing abbreviated periods of notice was sufficient to supersede custom.

The effect of customary notice provisions could be evaded in other

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I, 250; also *Dalloz,* 1898, I, 540; 1900, I, 485; 1901, I, 416. Certain distinguished legal scholars, notably Marcel Planiol, felt that these decisions were inconsistent with legislative intent, which was to require the employer to show "just cause" for dismissal. See, for example, his note under *Dalloz,* 1898, I, 329.

[20] Assignment of cases is made by the Court itself, and there is no apparent reason for the distribution of cases between the Civil and Requêtes Chambers. The Requêtes Chamber was abolished in the reorganization of the Court in 1947, at which time the Social Section of the Civil Chamber was created.

[21] *Recueil Dalloz,* 1907, I, 445; 1923, I, 198.

[22] *Dalloz Hebdomadaire,* 1924, 370; 1926, 592.

[23] *Recueil Dalloz,* 1895, I, 249.

[24] *Ibid.,* 1895, I, 316.

[25] *Ibid.,* 1906, I, 241.

ways. Under certain circumstances day workers were held to be under contract for definite (one day) term, and therefore not entitled to customary notice.[26] Sometimes pieceworkers were also held to be on contracts of definite term, ending with the completion of a job or lot.[27]

In general, the same basic doctrine of burden of proof applied both to suits for damages and to claims for pay in lieu of notice only, when a worker was summarily dismissed. That is, the burden of proof lay on the claimant. In the latter case, however, he was only required to show the existence of a contract or custom requiring notice of specified length and the fact of summary dismissal. This created a *prima facie* case, against which the employer could defend himself by showing cause for discharge. Though *force majeure* was legally sufficient cause, economic problems of the firm were not. In general, the Supreme Court, after some wavering, left it to the lower courts to determine the factual question as to whether the fault shown by the employer justified summary dismissal without notice. The courts might consider and adjudicate questions of gravity of the offense in connection with entitlement to notice though not in connection with the legal right to terminate the relationship.[28]

General statements of the conditions necessary to establish a wrong on the part of the employer in dismissal cases were long in developing. A very early statement was in an 1861 decision in which the *Cour de Rouen* developed the notion of malicious intent.[29] In 1926 the Supreme Court used language which has become standard: that an employer is liable for damages for abusive termination of a contract of employment if he acts with malicious intent or with *"légèreté coupable"* or *"blamable,"* that is, approximately, culpable negligence or capriciousness.[30]

One kind of case which still forms a large part of successful suits for abuse of right, and seems generally to illustrate applications of the doctrine of capricious dismissal, shades into a contractual claim. In these instances, though the contract of employment may contain notice provisions which have been formally complied with, implied promises of long-term employment were made. Thus, if an employee were offered "stable" employment or if an employee had undertaken substantial moving expense and severance of connections at the behest of his employer in the implied expectation of long-term employment, he might be upheld in his claim for damages if dismissed without justification. Of course, the proof lies on the employee to show the implied promise and hence the capriciousness of the discharge.[31]

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[26] *Ibid.*, 1917, I, 173.

[27] *Dalloz Hebdomadaire*, 1928, 51.

[28] *Recueil Dalloz*, 1918, I, 17; see also 1904, II, 40, in which it is made clear that gravity of offense is appropriate only for consideration of whether or not pay in lieu of notice is due, but not in determining right of employer to terminate without committing abuse.

[29] *Ibid.*, 1861, II, 52.

[30] *Ibid.*, 1927, I, 39; see also André Rouast, "Chronique," *Recueil Dalloz*, 1928, pp. 5 ff.

These cases usually involve white-collar and supervisory workers. A related type is that involving manual employees dismissed capriciously in that customary procedures were not followed. For example, when a practice of laying off workers for seasonal shutdowns in seniority order and spreading work among the remainder was not pursued, a long-service worker who was dismissed without justification was held entitled to damages.[32]

On the borderline between cases involving capriciousness and those in which the court, after formalizing the criteria, finds malicious intent is the case of an employer who, knowing long in advance that a shutdown was permanent, did not so inform his employees until they had been laid off for a month in the misapprehension that it was a normal seasonal layoff.[33]

Circumstances surrounding the dismissal may convince the court that it was either capricious or malicious. For example, a newspaper publisher who created a pretext for dismissing an editor by ordering his name removed from the masthead, an action which the editor refused to agree to, was held to have deliberately intended to reflect on the editor's reputation.[34] Dismissal of workers who had been ill, injured, or absent for good cause gave rise to litigation in which the courts occasionally held that the circumstances indicated abuse.[35] When purely personal pique or abuse of the relation was shown, as in the case of an employee dismissed for refusing to testify in his employer's divorce suit,[36] illegal motivation was obvious.

Another group of instances established precedents which were to become most important later. It was consistently held that employees discharged for exercising the rights of citizenship or for performing functions consistent with public policy could not be dismissed for these acts without recompense. In one case, for example, if it had been shown that the reason for dismissal was the employee's complaint of violations of an eight-hour law, she would have been entitled to damages.[37] It was a wrong to dismiss an employee because he was a union officer and an elected member of the labor court representing workers.[38] It was an abuse to dismiss an employee solely for his political beliefs.[39]

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[31] See *Recueil Dalloz*, 1900, I, 504; 1896, II, 23; 1900, II, 503.

[32] *Ibid.*, 1901, I, 23.

[33] *Ibid.*, 1896, I, 578.

[34] *Ibid.*, 1909, II, 199. The newspaper industry created many legal problems because of the special nature of the industry and the alleged need for accord between the opinions of the publisher and of the editorial staff. It was later the subject of special legislation.

[35] See *Recueil Dalloz*, 1922, I, 35; 1906, I, 503; 1902, I, 155; 1897, II, 441. Usually, however, recovery was limited to pay for the period of notice.

[36] *Ibid.*, 1920, I, 94.

Given the problem of proving the employer's wrong, successful damage suits were rare. Furthermore, damages actually awarded the manual or industrial worker were not great, though substantial sums were sometimes awarded to executives, salesmen, and the like. Awards of a few hundred francs to ordinary workers were generous.

The doctrine of abuse in the exercise of contractual rights was, of course, technically applicable to both employer and employee. Though suits by employers on these grounds were rare, several cases do appear in which the employer successfully sued an employee who quit without giving contractual notice.[40] Perhaps the most important of such cases are those in which strikers were held liable for violating notice provisions of their personal contracts,[41] though if proper strike notice were given by the union, there was no liability.[42] In general, unless the employer breached the contract, for example, by changing the job assignment, or unless the employee had real reason for quitting without notice, the employer was entitled to indemnification for failure to work out the notice period.

Judicial interpretation of the Law of 1890 succeeded in minimizing its impact. The statute merely made it a little less difficult for workers to get indemnification for loss of employment, because it provided specific reference to possible damages and thus obviated the need to rely solely on tricky interpretation of the several relevant sections of the Civil Code before courts which seemed insistent upon assimilating contracts of employment into general contractual rules.

Legal and parliamentary accusations of misapplication of the intent of the law were not long in coming. Marcel Planiol, perhaps the leading legal scholar in the field of industrial law, in note after note on decisions of the Supreme Court criticized its unwillingness to admit change.[43] In 1892 he wrote that the new law had worked a profound change in French law, tying worker and employer more closely together in a system replacing the old one under which their relations lasted only so long as their common will and either party could without sanction arbitrarily terminate them.[44] This was, no doubt, an exaggeration of the intent of the compromise reached in Parliament, but it expressed a widely held view which, when it proved contrary to that of the courts, provoked movements toward further reform.

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[37] *Dalloz Hebdomadaire,* 1927, 519.

[38] *Recueil Dalloz,* 1911, I, 53.

[39] *Ibid.,* 1893, II, 466.

[40] *Ibid.,* 1906, I, 241.

[41] *Ibid.,* 1902, I, 323.

[42] *Ibid.,* 1924, I, 209.

[43] See his notes to *Recueil Dalloz,* 1892, I, 585; 1897, I, 401; 1898, I, 329. Planiol was quoted verbatim but without reference by a lower court in a decision subsequently quashed. *Dalloz,* 1898, I, 540.

A note by G. Appert in 1899 summarized these criticisms and proposed the philosophical approach that later was to dominate French social and labor legislation. He asked for legal recognition of what he saw as the trend in parliamentary thought that workers should be treated in some ways as minors, or, as it was later commonly put, as the weaker of the bargaining parties. Departing far from conventional contractual notions, he proposed that workers be entitled to damages for loss of employment unless the employer could affirmatively show good cause for dismissal, from which he would exclude purely economic reason.[45] Indeed, dissatisfaction centered principally upon the insistence by the Civil Chamber of the Supreme Court on affirmative proof by the worker of the commission of a wrong by the employer.

As early as 1904 there was renewed agitation for legislative action, particularly on the question of burden of proof. In that year the *Conseil Supérieur du Travail* recommended legislation providing that neither party could terminate the contract of employment without legitimate reason, which must be proved by the one proposing the termination. This recommendation began a typically lengthy parliamentary consideration which did not end in legislation until 1928. Then the Parliament succeeded only in adopting an ambiguous solution, again leaving it largely to the courts to decide what was to be done. Instead of dealing directly with the placing of the burden of proof, the Law of 19 July 1928 provided that the tribunal hearing a claim for damages for abuse of right might make its own inquiry, and, further, that the decision had to mention the reason given for the termination of the relationship.

Some commentators[46] believed that the provision requiring mention of the employer's motive for dismissal was intended to have the effect of placing upon him the burden of proving its reality and legitimacy. They also saw the provision for a court investigation as requiring the employer to justify his act and as implying a burden of proof on him.

In the *Conseil Supérieur du Travail* there had also been discussion of making the proceeding a "contradictory debate" in which no formal burden of proof would lie on either party.[47] This proposal, however, was so inconsistent with French legal tradition and practice that even if it had been included in the statute, its intent would have had to be much more clearly specified for the courts to have given it effect.

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[44] *Ibid.*, 1892, II, 489.

[45] *Recueil Sirey*, 1899, I, 33.

[46] See André Rouast, note under *Recueil Dalloz*, 1930, I, 71.

The practical result of the change in the statute was that it remained to be proved that the employer had committed a fault. The plaintiff was assisted in sustaining this burden by the requirement that the court inquire into the motives of the employer and, at its discretion, initiate an inquiry. But the 1928 law made no basic change in the legal relationship of the worker to his employment. He could be removed from his job with or without good cause, and could recover damages only if he could prove, perhaps with the assistance of a judicial inquiry, malicious intent or culpable negligence or capriciousness on the part of his employer. He still had the enormously difficult problem of proving illegal motivation.

Some improvements were achieved, however, by the passage of the 1928 statute. For the first time a clear statutory distinction was made between pay in lieu of notice and damages for abuse of the right to terminate. The law provided that damages might be awarded separate from and in addition to such pay as might be due in lieu of notice. Furthermore, there was implicit statutory recognition of the disparity in bargaining power between employer and employee in the clause that made void any contractual or quasi-contractual notice provisions less favorable to the employee than was usage in the occupation. However, though individual contracts could not derogate from custom, collective contracts could. The priorities then established were, first, collective agreements; second, custom; and, third, individual contracts. This effectively ended the practice of holding workers to unilateral shop rules which provided relatively unfavorable notice terms. Finally, the law recognized the continuity of enterprises which changed hands by providing specifically that the successor remained obligated by contracts of employment binding the enterprise.

THE DEVELOPMENT OF EXCEPTIONS

The Law of 1928 fixed the general principles of *abus de droit* as it applied to individual employment relationships. Since then there have been three main lines of development: (1) With respect to a few particular categories of employees there has been a reversal of the traditional burden of proof as well as an elaboration of special rules. (2) In general there has been a gradual shift in emphasis as to requirements of proof which has tended to make it easier for the employee to establish his right to damages for abusive dismissal. This has come about largely through the development of the concept of *légèreté blamable.* (3) A new law in 1958 finally broke the classical symmetry of employment contracts by providing for minimum periods of notice which were not necessarily reciprocal.

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[47] *Ibid.*

As early as 1909 special legal provision had been made for suspension of the contracts of employment of pregnant women, so that their absence from work during specified pre- and post-natal periods was not good cause for termination of their employment.[48] In 1913 legislation further provided that pregnant women could quit without notice or liability, regardless of custom or the contract terms. Thus, for pregnant women, the employer in effect was required to prove that good cause other than absence from employment existed before he could absolve himself of liability for abusive breach of the contract.

As early as 1897 it had been held that illness of the worker merely suspended and did not terminate the contract of employment.[49] It gradually developed, then, that dismissal of a worker absent because of illness required proof by the employer of good cause apart from the mere fact of illness. Absent that proof, the employer was liable for abusive breach.[50] However, a prolonged illness could result in termination without liability. It is of interest to note that this doctrine was developed wholly by the courts without specific statutory foundation.

During the period 1936–1939, when a law providing compulsory arbitration of collective disputes was in effect, boards of arbitration and the courts developed doctrines holding that a strike suspended but did not break the contract of employment. These doctrines were further developed after adoption of the Constitution of 1946, which guaranteed the right to strike within the context of laws regulating it.[51] The Law of 11 February 1950 provided specifically that a lawful strike merely suspended the contract of employment and did not terminate it. Hence, an employer who dismissed a striker was under the obligation to prove that good cause apart from mere participation in a strike justified the dismissal. Otherwise he became liable to damages for abusive breach.

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[48] Law of 27 November 1909, subsequently codified as Article 29, Book I, *Code du Travail.*

[49] Brun and Galland, *op. cit.*, p. 603.

[50] *Ibid.*, p. 605.

[51] See Durand and Vitu, *Traité de Droit du Travail* (Paris: Dalloz, 1956). III, 832; also Cour de Cassation, Chambre Civile, Section Sociale, Dec. 16, 1954. Generally before 1936, not only did the strike amount to a breach of the contract on the part of the employees, but it might also be abusive on their part and subject them to liability for damages to their employer. See *Dalloz Hebdomadaire,* Sommaire, 1931, 17, 39.

French strike law is complex—as varied as the strike objectives and tactics of French unions.[52] The protection against dismissal applies only to workers participating in a lawful strike, which excludes political strikes and those involving certain unlawful tactics such as slowdowns. Workers taking part in unlawful strikes may be dismissed for their action without liability.

In these special categories of pregnancy, illness, or participation in a lawful strike the common element is that the worker is absent from his place of work. Given the notion that his contract is suspended rather than terminated, it follows easily that a presumption exists that he has committed no work-related offense warranting discharge. With such a presumption, the reversal of the usual burden of proof becomes readily acceptable.

A fourth group of employees placed in a special position are the employee representatives, including the shop stewards required to be elected in establishments of more than ten persons, and the members of the works councils also elected under terms of special legislation. The laws of 1945 and 1946 establishing the right of works councils and shop stewards provided that no worker representative falling into either of these categories might be dismissed except with the consent of the works council, or, failing that, of the Government Labor Inspector. He could, however, be suspended pending final decision. Throughout the procedure, a presumption in favor of the representative existed, and the burden of proving good cause for dismissal before nonjudicial bodies lay, practically, with the employer.

However, what was meant by "final decision" remained unclear. In the first place, if assent to the dismissal could not be obtained from the works council or the Labor Inspector, the employer still had (and has) the right to go to the courts requesting judicial resolution of the contract, though, as the plaintiff, he had to prove cause for termination. If he did not make this choice, the initiative remained with the employee to attempt to enforce his legal right. If he sought damages for abusive dismissal, this constituted an admission of the fact of dismissal, though he was likely to obtain a favorable judgment. Here again there was reversal of the traditional burden of proof.

The procedure for terminating the suspension could be quite long. A worker who, unable to remain without employment throughout it, accepted other employment terminated his contract of employment by so doing. He could thereafter obtain damages for *abus de droit,* but he had no further claims on employment in his previous job.

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[52] See F. Meyers, "A Comparative Study of Law of the Strike," and comment thereon by G. Camerlynck, in R. Slovenko, ed., *Symposium on Labor Relations Law* (Baton Rouge: Claitor, 1961).

An anomaly was, therefore, presented. At law, if the final decision held that the employee was improperly dismissed, either the nature of the action constituted termination of the contract, or the finding terminated the suspension and the contract remained in effect. But, though the contract remained, means of enforcing it were difficult to find. The contract provided for rendering of services in return for payment. But since the rendering of services by the employee could not be forced, it followed by the usual rules of reciprocity that the employer could not be forced to accept them. In either case, the Civil Code provision that an obligation to do or not to do could be resolved only by damages was held to be applicable. Reinstatement could not be required as a sanction.[53]

It should be noted parenthetically that it is a criminal offense to interfere with the functioning of the statutorily provided representatives of workers. Though the civil courts held under the 1946 legislation that a suspension could remain in effect until the termination of a possible proceeding for judicial resolution of the contract of employment, the criminal courts held consistently that if assent to the dismissal was refused by the works council and the Labor Inspector, at that point the employer had to permit the representative to perform his statutory duties and to have access to the enterprise for that purpose.[54]

The Decree of 7 January 1959 tightened the protection afforded worker representatives by extending it to candidates for election, and for a period of six months beyond the expiration of the term of office. But more important for our purposes, it provided specifically that the suspension should cease after refusal by the works council and/or the Labor Inspector to sustain the dismissal.[55] Since the decisions of the works council and the Labor Inspector must be made within a very short time, the new law has the effect of settling the legal status of the suspension quickly.[56]

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[53] See F. Meyers, "La Réintégration des Salariés selon le Droit Français et le Droit Américain," *Droit Social,* April 1962.

[54] See *Dalloz Hebdomadaire,* 1958, 421, and note by Rouast; *Jurisclasseur Périodique,* 1956, II, 501, note by Brethe de la Gressaye.

[55] There is provision for appeal to the Minister of Labor. This, however, is an administrative rather than judicial appeal, on grounds of alleged excessive use of administrative authority. Though the Minister may reverse the Inspector and thus retroactively sustain the suspension, appeal to the Minister does not suspend the effect of the Inspector's decision, which, in turn, terminates the suspension of the worker representative. See Cour de Cassation, Chambre Civile, Section Sociale, Dec. 13, 1961, reported in *Droit Social,* April 1962, p. 235, and commentary, p. 236.

[56] The comment referred to in the previous footnote calls attention to what seems

Where this leaves the worker representative is not clear. The Social Chamber of the Supreme Court still is unwilling to force reinstatement upon the employer, adhering to the classic view that an obligation to do cannot be forced.[57] On the other hand, the contract of employment remains legally in effect.

It is clear that, under threat of possible criminal penalty, the employer must permit the representative to perform his legal duties in the enterprise. Furthermore, a recent decision of the Criminal Chamber of the Supreme Court indicates the view that failure to reinstate the representative to his job as well as to his function may be held to be criminal interference with his function.[58] The Social Chamber is still unwilling to admit reinstatement, though realistically this may be the only way in which the representative function can be properly performed and the integrity of the position truly protected. So far as this Chamber is concerned, the representative is entitled only to continuing wages, or possibly a lump sum award in lieu thereof.[59]

The general weakening of the doctrine that the burden of proof of employer fault lies on the dismissed employee comes principally in the greater willingness of the courts to adjudge a dismissal as arbitrary or capricious. For example, though the law does not require the employer, at the time of discharge, to give the employee a reason, it does require that the judgment of the court state the reason alleged by the employer. Thus, the employer is required in court to give a reason. In recent decisions the courts have sustained charges of abusive dismissal

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to be an *obiter dictum* in the case which implies that if an action for judicial resolution had been actually initiated by the employer involved, even under the new law it would have permitted the suspension to stand, but that since such an action had not been initiated, it did not. This, however, is not entirely clear. But see *Droit Social,* Jan. 1963, pp. 46–47, for case and comment on effect of petition for judicial resolution. See also Ministerial Circular T.M.O. 23/62 (III), Aug. 3, 1962, in which the Minister of Labor refers to decisions of the Criminal Chamber of the Cour de Cassation holding that initiation of action for judicial resolution does not allow the suspension to stand.

[57] A most interesting case in a lower court is reported in *Droit Ouvrier,* March–April 1960, p. 96. This was an appeal to the Appeals Court of Besançon from a decision of the labor court which, among other remedies, ordered an employer to reinstate a dismissed shop steward, on pain of daily fine of 5000 old francs per day. This was upheld by the Appeals Court, even though the employer agreed to pay the shop steward his wages until the termination of an action for judicial resolution of his contract of employment. So far as has been discovered, this case was not appealed to the Supreme Court.

[58] See Ministerial Circular T.M.O. 23/62 (III), Aug. 3, 1962, and case cited.

[59] See *Liaisons Sociales,* No. 457, Nov. 1962, and No. 459, Dec. 27, 1962; Brun and Galland, *Droit du Travail, op. cit., Mise à Jour,* 1962, p. 162; question to and answer from Minister of Labor, *Journal Officiel,* Débats Parlementaires, Assemblée Nationale, Sept. 11, 1961; Cour de Cassation, Chambre Civile, Section Sociale, Oct. 10, 1962, in *Droit Social,* Jan. 1963, pp. 46–47.

when they have found the stated reason to be a mere pretext.[60] Often a mere showing that the employer has disregarded procedures or rules contained in collective agreements or plant work rules converts the dismissal *ipso facto* into an abusive one. Brun and Galland go so far as to say that "one ends thus with an approach to the German legislation which puts the burden of proof on the employer."[61] However, French law is still far from the American common law of arbitration which, enforcing protections in collective agreements against discipline or dismissal without good cause, clearly places the burden of proving the offense on the employer.

French Law of Layoff

There are two provisions of French law which affect employers' rights to reduce forces and to select among the employees those to be laid off. They are contained in an immediate postwar measure, designed primarily to permit orderly control of labor markets. Promulgated in May 1945 and still in effect, it provides, among other things, that all dismissals shall require the approval of the Inspectorate of Labor. Since the Inspector is charged only with controls of an economic nature, approval of individual dismissals for non-economic reasons is merely *pro forma*. The Inspector has no authority to disapprove them. He can, however, perform a mediatory function.[62]

With respect, however, to reductions in force for economic, organizational, or technological reasons, the employer is required under the law, first, to consult with the works council and, then, to obtain permission from the Government to carry out the proposed reduction in force. The function of the works council is purely consultative; it has no authority to prevent the action. The Inspector has authority to disapprove, but if the dismissals have already taken place, or take place despite disapproval, the courts have held that the employment relation is legally terminated, and no remedy is available to the workers. Indeed, mere inobservance of these requirements to seek and obtain approval is not grounds for sustaining a charge of abusive dismissal. They can, however, be enforced in the criminal courts.[63]

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[60] Brun and Galland, *op. cit., Mise à Jour,* 1962, p. 100, and cases cited. But as late as 1958 it could be said that "The Supreme Court has already decided that the inexactness of the reason for dismissal given by the employer does not alone establish *abus de droit*. See note signed F. D., *La Semaine Juridique,* 1959, II, 11052.

[61] Brun and Galland, *op. cit., Mise à Jour,* 1962, p. 101.

[62] G. H. Camerlynck, *Traité Pratique de la Rupture du Contrat du Travail* (Paris: Librairies Techniques, 1959), pp. 250–51.

[63] An employer refused permission may, under certain circumstances, obtain damages from the state. See Conseil d'État, affaire Sté des Ateliers Cap Janet, Oct. 28, 1949; also note on this case, *La Semaine Juridique,* 1950, p. 5861.

The law further requires that the employer establish in his work rules or in the collective agreement principles governing the order of economic dismissals, taking into account seniority, number of dependents, and qualifications. These principles, then, must be adhered to in selecting employees for layoff purposes. Failure to abide by these rules, insofar as they effectively discriminate between employees, can constitute grounds for damage suits as *légèreté blamable*.

As noted, the law had as its primary purpose the re-establishment of order in labor markets after the war. However, a recent circular of the Ministry of Labor[64] emphasizes that it should be used to avoid "the consequences, often unhappy for wage earners, even when the general employment situation is such as to permit a quite rapid re-employment." And the criminal sanctions are sufficiently severe to demand adherence to the procedural requirements.

The administrative controls cover situations in which reductions in force are anticipated for all types of economic and technological reasons. The first task of the Inspector is to verify the validity of the alleged reasons for the proposed dismissals, and to assure himself that the works council has been consulted and been given an opportunity to suggest alternatives. He then assesses the impact of the dismissals on the labor market in the area. He can propose alternatives, and even refuse permission to make the reductions if the employer will not adopt reasonable proposals of this sort.[65] He can, for example, propose retraining programs if a technological change requires shifts in skill distributions, so that hirings and dismissals are occurring together. Governmental financial aid is available for such programs. He can suggest that normal attrition, including voluntary quits and anticipated retirements, be allowed to accomplish the required reduction. He can also suggest reductions in the work week, and can revoke permission to work regularly scheduled overtime if such has been obtained under the Decree of 24 May 1938 requiring authorization for hours in excess of forty per week.[66] Dismissals cannot be authorized for some workers when others doing similar work are working overtime.[67]

When an employer seeks permission to reduce forces, he is required to submit to the works council and to the Labor Inspector a list of the employees he proposes to dismiss. The works council may make comments on this, suggesting alterations. Both are entitled to verify its conformity with rules established in the plant regulations or collective agreement. If, as is often the case, these documents merely reiterate the legal language that account will be taken of seniority, dependents, and skill, the courts have held that the law establishes no priorities among these, and that the employer need show only that he has taken the factors into consideration.[68]

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[64] T.M.O. 24/62, Nov. 7, 1962, reproduced in *Liaisons Sociales*, No. 2674, Nov. 14, 1962.

[65] Refusals by the Inspector are subject to administrative appeal to the Minister of Labor for excessive exercise of power.

[66] In general, the work week in France is now a regularly scheduled forty-eight hours, with certain premiums for work in excess of forty.

[67] T.M.O. 24/62, *op. cit.*

The Inspector, however, may ask the employer to make changes in order to avoid the dismissal of workers who may find it particularly difficult to find other jobs, as, for example, elderly or physically handicapped workers.[69] He may require an agreement by the employer to give priority for re-employment to dismissed workers.[70] He often withholds permission until placements of dismissed workers in new jobs are arranged. Incidentally, French employers assume a major role and obligation in seeking employment for workers to be dismissed. This function is particularly well organized by the employer associations in the cotton textile industry.

In the celebrated *affaire Brinon* a protest by a union against a proposed layoff on the ground that the economic difficulties of the firm were due to inefficient management resulted in denial of permission to reduce forces. The matter was taken to court, which held that permission could not be refused on this ground.[71] This decision was consistent with the principle commonly expressed by the French courts that the employer is sole judge of matters concerning the welfare of the enterprise.

The effectiveness of the law is variously evaluated by trade-union and management people. Although the termination of services of employees takes effect whatever may be the action of the Labor Inspector, dismissals without permission subject the offending employer to penal sanctions. Hence what happens is that the employer simultaneously gives notices to his employees and seeks the required permission. If it has not been obtained by the time the notice expires, the employer may have to continue the employees. Thus, the Inspector is in an excellent bargaining position if he wishes to delay, though he may ultimately find that he has no good legal ground to refuse the necessary permission. Both some employer and some union informants said that in certain cities it was extremely difficult to reduce forces. Some union representatives claimed that in the less organized areas, in which the tradition that the employer was *maître chez lui* still prevailed, the Inspector approved applications readily and as a matter of course. In fact, they said that there was a deliberate movement of some employers to move out of "proletarianized" regions, which was resisted by the unions through pressures on the Inspector when permission was asked to close old plants for this purpose.

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[68] Cour de Cassation, Chambre Civile, Section Sociale, May 4, 1956, in *Droit Social,* Sept.–Oct. 1956, p. 488.

[69] French law requires employers to maintain in their employ certain proportions of physically handicapped persons.

[70] The Decree of 24 May 1938 required prior re-employment rights for dismissed workers. This requirement, however, was removed in 1944 by the Decree of 24 November 1944 of the Conseil d'État. But see T.M.O. 24/62, *op. cit.* Many collective agreements specify re-employment rights.

[71] Cour de Cassation, Section Sociale, Jan. 3, 1958; see discussion of the case in François Sellier, *Stratégie de la Lutte Sociale* (Paris: Éditions Ouvrières, 1961), pp. 53 ff.

Sometimes layoff issues assume major political proportions, as in the case, for example, of a layoff in the Renault plants in late 1960. In this event, as in certain other instances, unions try to dramatize the situation by strikes and demonstrations of various kinds. Such pressures on the Inspector may be successful. Indeed, in the Renault case, the Minister of Labor finally had to approve the layoffs. An employer association representative described a case in Rheims in which, by the threat of adverse publicity, the employer was induced to cut his layoff list from about 15 to about 8 per cent of his employment.

Of course, the regulations have been administered in almost continuously tight labor markets, and so good administrative reason to prevent reductions in force has not often existed, save in the few regions with special problems, as, for example, the northern coal mine area. In much of France employers have often hoarded labor through temporary difficulties. The test may come if and when the general level of employment declines.

The Law of 19 February 1958 relating to periods of notice is of great significance, both substantively and philosophically, in the development of French law and practice. It provides that when the employer seeks to terminate a contract of employment he must give to employees of six or more months' service not less than a month's notice, or pay in lieu thereof. For employees who wish to quit, the notice obligation remains that fixed by usage or collective agreement. It is said that prior to the law the customary notice in most manual industries and occupations was not more than one week.[72] It was, of course, always reciprocally equal.

The substantive importance of the law is apparent. A notice period of one month must serve as a substantial deterrent to many kinds of layoffs that would previously have occurred. Further, in many cases it must be resolved into a kind of severance pay.[73]

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[72] See *Journal Officiel,* Débats Parlementaires, 1956–57, Conseil da la République (Séance du 5 Décembre 1957), pp. 2134–35.

The substantive provisions caused great controversy in Parliament. The original bill, as proposed by the special Parliamentary Commission, provided that workers with one or more months of service would be entitled to the long notice. This was altered in the *Conseil de la République* to one year. The Assembly responded with a proposal for three months, to which the *Conseil* responded with six months, the final form of the law. Efforts were made to exempt various industries, such as construction, agriculture, and domestic service. These all failed, though the lengthening of the qualification period doubtless has the effect of exempting many seasonal occupations. Furthermore, it is clear that in such industries as construction, contracts of employment for determinate time or work are still possible.

But the greatest outcry from the Right came on the principle of reciprocity. This, of course, is the philosophical importance of the change. For the first time it breaks in a general way with the notion that contracts of employment must be symmetrical in the rights and obligations conferred. The objection on this ground was dismissed contemptuously by the reporter for the special commission on the ground that it was a relic of the Napoleonic Codes and quite inappropriate to modern industry.[74] The Minister of National Affairs, M. Gazier, observed that legal equality does not always correspond to actual equality.[75] On this crucial issue the Assembly rejected, by a vote of 340 to 228, an amendment that would have affirmed the principle of reciprocity by requiring equal notice from the employee.[76]

The Role of Collective Bargaining in France

In general, French collective agreements add less to legal rules than do collective agreements in the other countries. Their importance should not be underestimated, however, for a frequent sequence of events in France has been the generalization through law of a change in working conditions established in a few leading collective bargains.

Disciplinary Dismissals

In the area of disciplinary dismissals, the contribution of collective agreements has been almost wholly procedural. A very few national and regional collective agreements provide some sort of procedure for hearing dismissal cases before final decision is made.[77] A considerably larger number of plant agreements provide an opportunity for hearing, and a few formal bipartite discipline committees have been established. The typical procedure allows, say, a forty-eight-hour period for investigation and hearing in which the shop steward may participate before the dismissal becomes final. As we have indicated above, failure to comply with this procedure may result in entitlement to damages for abusive dismissal.

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[73] For example, see case of a Renault layoff, *Le Monde*, Oct. 27, 1960.

[74] Robert Coutant in *Journal Officiel*, Débats Parlementaires, 1956–57, Assemblée Nationale (Séance du 6 Février 1957), pp. 698, 726.

[75] *Ibid.*, p. 700.

[76] *Ibid.*, p. 727.

The procedure often delays the act of dismissal pending hearing. It does not impose any substantive obligations on the employer. However, union and management informants say that settlements are sometimes reached.

Plant rules often establish sanctions for specific offenses. According to law, these must be shown to the works council for comment before submission to the Labor Inspector for approval. However, this appears to be merely a formality; the council is said to have no influence in altering proposed rules in the interest of employees. Most rules examined were obviously drawn by employers interested in assuring themselves of unilateral control over discipline. The role of the Inspector is simply to confirm their legality.

Many collective agreements confirm the provisions of the law with respect to protection of ill and injured workers and pregnant women. Often the generalities of the law are transcribed into more specific regulations concerning the rights of workers absent for these reasons as against those of their temporary replacements.

Collective action can, of course, be informal as well as formal; indeed, as we have seen, informal rules are enforced in Britain by group action of workers protesting what they regard as unjustified dismissals. This sort of thing occurs in France, though much less frequently. Informants said that "solidarity strikes," usually protesting the dismissal of official worker representatives or union leaders, occur occasionally in the metal and chemical industries, and less frequently in others. Usually these are short demonstrations of protest rather than a determined effort to get a reversal of the managerial decision.

Reductions in Force

Collective bargaining has been much more important in supplementing legal rights in problems of reductions in force.[78] The most significant additions to the law consist in the negotiations of severance pay allowances. Next, perhaps, in importance are those provisions which deal with work sharing or consultation on alternatives to layoffs. Most agreements provide re-employment rights for laid-off workers, and a few assign weights to the legal criteria for order of layoff. Many agreements also have notice provisions, but with rare exception these have become obsolete since they usually afford shorter notice periods than those required by the 1958 law.

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[77] For example, the bus and streetcar agreements provide for hearing before a bipartite discipline committee. The national textile agreement simply provides for hearing before management.

Writing in 1955, Germaine Lenoir remarked that severance pay allowances, which had been increasing for white-collar and supervisory employees, were also beginning to appear for manual workers.[79] By 1963, provision for severance pay for manual workers in both national and regional and in plant agreements was quite common. Such provisions typically make no distinction between reductions in force for economic reasons and those for technological reasons, applying to both. They generally are limited to workers with a specified minimum period of service, often five years. The amount of severance pay is graduated with length of service, ranging from about one fourth to one third of a month's pay for each year of service, with a frequent maximum of three months' pay. These allowances are in addition to any pay in lieu of notice.

Provision is commonly made for advance consultation with the works council before a decision to reduce forces is made final. Some agreements list possible alternatives to be considered, including reductions in hours or other forms of work sharing. Many provide specifically that layoffs will be the last resort, and a few forbid layoffs so long as the hours of work are in excess of forty.

A landmark agreement in the Renault automobile plants in 1958 established a special fund at the expense of the employer. This fund is used to compensate workers whose schedules are reduced below forty-eight hours per week. The first hour of reduction is paid for at the full rate, and the next six at half the amount that the workers would have earned had the schedules not been reduced. The Renault agreement set a precedent which was followed in a substantial number of large plants, particularly in the metal-working industries. Where such funds exist, there is strong pressure to reduce hours as an alternative to a layoff, at least within the limits set for the supplemental payments.

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[78] The material in this section with respect to provisions of collective agreements has been taken from examination of a large number of agreements; from summaries of national and regional agreement provisions in Confédération Française des Travailleurs Chrétiens, *La Revue de Militant, "Formation,"* May 1961; and from Liaisons Sociales, *Accords d'Entreprise,* Feb. 1963.

[79] "Le Contenu des Conventions Collectives," *Droit Social,* Nov. 1955, p. 559.

A very unusual agreement was entered into in 1960 in a shoe plant. It was for one year, but was automatically renewed. The agreement provides that for its duration no regular employee will be dismissed, save, of course, for serious disciplinary offense. In return, the firm was given great freedom in work assignment and changes in job content. It also contains a kind of profit sharing, and was negotiated under the terms of the Ordinance of 7 January 1959 intended to encourage profit-sharing schemes. In many ways it resembles the Kaiser agreement in the United States, though it has resulted in wider, rather than lesser, use of individual incentive payments.[80]

When layoffs are determined upon, the law requires that the employer, in making up the layoff list, take account of seniority, qualifications, and number of dependents, and that he consult with the works council. The vast majority of collective agreements, plant as well as national and regional, merely reiterate these requirements of the law, or are completely silent. But a few assign weights to the three criteria by giving seniority equivalents to each dependent and to qualification as determined by management, with stated maximums and minimums. In these cases, then, managerial control over selection for layoff is limited. Consultation is often merely a formality, as we have observed, but it may be meaningful where both management and works council are willing to assume real responsibility. Most agreements now provide for re-employment priorities for laid-off workers during the six months or year after their separation.

Though the law has made obsolete many notice provisions of collective agreements, a few go even beyond the requirements of the law, either directly or by providing for *mensualisation* of manual workers. The latter provisions give manual workers all the benefits available to monthly-paid workers, including long notice. The notice clauses may provide, on the one hand, that under certain circumstances the worker may leave without the required notice, or, on the other hand, specifically make him liable for a payment to the employer in lieu of notice equal to what he would have earned had he stayed. Quite commonly the worker is entitled to two hours per day free to seek other work, and in some agreements this may be cumulated.

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[80] See "Un Exemple d'Intéressement du Personnel: Les Établissements Rehault à Fougères," *Droit Social,* Nov. 1962.

Summary

Collective bargaining in the British and American senses has developed rather more slowly in France, though the last eight or ten years have seen a proliferation of important national and regional agreements and, perhaps more significant, of plant agreements.[81] There are many reasons for this, including the traditional French reliance on law and the historic antipathy of the French labor movement to any kind of accommodation with employers on a permanent basis.

Though collective bargaining, then, reflects little more than the provisions of the law, French law, despite its heritage of liberalism, has had to recognize in some measure the pressures of workers to free themselves from the complete dependence on the will of the employer that is a corollary of the traditional contractual view. Though French employers probably in fact retain more freedom, and French workers exercise less control, than their British and American counterparts, the slow historic trend has shown a shift toward greater employer responsibility and greater worker and state control. Specific rejection of the traditional approach which assumed perfect reciprocity and vesting of entire responsibility in management for the welfare of the enterprise appears in the recent notice law, in the ministerial circular concerning application of controls over reductions in force, and in the special position of worker representatives. The development of severance pay is the most important contribution of collective bargaining.

In France, as in Britain and the United States, symmetry in an essentially contractual relation appears to be an obsolescent social idea. Though change may have been less rapid for those who have benefited from it in France, in contrast to the Anglo-Saxon countries it has been of much more general application because most change has been achieved by law.

From France we turn now to Mexico, many of whose institutions were derived from Roman sources through Spain and, indeed, from France directly. In Mexico, however, a revolutionary culture has finally brought significant departures from a remarkably persistent heritage of continental liberalism.

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[81] French law favors national bargaining in that a plant agreement cannot go beyond mere wage matters unless the employer is also party to a national agreement to which the plant agreement is a supplement.

Chapter 4

Job Security in Mexico

Mexican labor law is of particular interest for purposes of comparison with the French. While in some sense it represents a formal, explicit rejection of its antecedents in French liberalist legal philosophy, it retains elements of its individualistic heritage.

The Mexican Constitution of 1857 firmly laid the liberal foundations of Mexican law. Though, as de la Cueva observes, there was at the time "on the point of birth a law of labor,"[1] that law was not born. The Constitution limited itself to a guarantee of the liberty of work, and in general established an individualistic, laissez-faire legal system. And the Civil Code enacted in 1870 followed essentially the lines established in the French *Code Civil.*[2]

De la Cueva, even while deploring the basic liberalism of the Constitution and the Civil Code, pointed out that they were superior to the French in attempting to dignify labor by a distinction between the ordinary contract for the hire of things and a contract for the hire of services, a distinction made in the *Exposición de Motivos* relating to special protection of domestic servants. He noted also that the Mexican Code did not contain any special presumptions in favor of the employer as did the French, a reference presumably to Article 1781 of the French Code giving special weight to employer testimony, which was repealed in 1868.[3]

But more than half of the period from 1857 until the Revolution of 1910 was occupied by the presidency of Porfirio Diaz. There can be no doubt that during this period constitutional and statutory guarantees of individual liberty and equality of worker and employer before the law had little meaning, though toward the end of this period, in 1904 and 1906, the first Mexican workmen's compensation law was passed. For many of the 1910 revolutionaries, the object of the Revolution was the re-establishment of the liberal regime foreseen in the 1857 Constitution.

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[1] Mario de la Cueva, *Derecho Mexicano del Trabajo* (6th ed.; México, D.F.: Porrúa, 1961), I, 93.

[2] *Ibid.*, p. 94.

[3] *Ibid.*

In the period 1910 to 1917 several of the Mexican states enacted labor legislation, some of whose terms provided precedents for Article 123 of the 1917 Constitution. Of particular interest was the establishment of special labor courts in the state of Yucatan. But contemporary Mexican labor law is based on the Constitution of 1917, the fruition of the 1910 Revolution, and particularly on Article 123, which described in great detail the rights with which Mexican workers were to be endowed. On a literal reading this article seems to depart far from antecedent law, and in many respects it had such an effect. But in the essential matter of job security, the change was less abrupt. At first, little more than what was intended in 1857 resulted. As time passed, additional guarantees took effect.

The original draft constitution presented to the Congress of Querétaro in 1916 by then President Carranza dealt with problems of labor by what was essentially a reaffirmation of the guarantee of individual liberty contained in the Constitution of 1857, though with important additions. It is clear, however, that Carranza intended protective legislation going beyond the absolute protections of the Constitution. In his message to the constitutional convention, he indicated the intention to seek legislation dealing with such matters as maximum hours, minimum wages, workmen's compensation, and other similar subjects under the powers to be granted the federal legislature.

The Carranza draft proposed that Article 4 of the Constitution protect the right of the individual to work at any lawful occupation, and that Article 5 provide that, save for penal sentence, no person might be required to render service without his consent and without just compensation. These were reiterations of the 1857 provisions. Additional provisions would have limited contracts of work to a maximum of one year and prohibited agreements renouncing the right to engage in any profession, industry, or commerce.[4] Further, Article 73 would have given the Federal Congress the power to legislate in labor matters.

The principles of the Carranza draft were supported by those delegates who held that the Constitution should serve to guarantee fundamental rights, while the details of protective legislation should be left to legislative action. These views, however, were overridden by delegates who held that a revolutionary constitutional assemblage should be prepared, in the interests of revolutionary aims, to forsake the traditional view of the content of a constitution. General agreement was reached to this effect, and a drafting group was organized ultimately to write a special labor article. Its report, with relatively minor modifications, became Article 123 of the Mexican Constitution of 1917.[5]

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[4] See Pastor Rouaix, *Génesis de los Articulos 27 y 123 de la Constitución Política de 1917* (México, D.F.: Biblioteca del Instituto Nacional de Estudios Históricos de la Revolución, 1959), p. 69.

In addition to establishing the principles of social security, a legal minimum wage, maximum hours for men as well as for women and children, the obligation of certain employers to provide housing and educational facilities, protection of wage payment, equal pay for equal work, rights of association and strike, profit sharing (not implemented until 1962), and the establishment of labor tribunals, Article 123 provided certain guarantees as to the right of employees to continued employment.

THE LAW RELATING TO JOB SECURITY

Constitutional Protection against Dismissal

The basic provisions with respect to the worker's right to his job, or to compensation for improper dismissal, were contained in Sections XX, XXI, and XXII of Article 123:

> XX. Differences or conflicts between capital and labor will be subject to a decision of a Board of Conciliation and Arbitration, composed of an equal number of representatives of workers and of employers, and one representative of Government.
>
> XXI. If the employer refuses to submit differences to arbitration or to accept the award rendered by the Board, the contract of employment shall be terminated and the employer will be obligated to indemnify the workers with a sum equal to three months' wages, in addition to the responsibility resulting from the conflict. If the refusal is on the part of the workers, the contract of employment will be terminated.
>
> XXII. The employer who dismisses a worker without just cause, or for having joined an association or union, or for having taken part in a lawful strike, will be obligated, at the election of the worker, to fulfill the contract or to indemnify him with an amount equal to three months' wages. He will have the same obligation when the worker leaves the employer's service because of acts of dishonesty on the part of the employer or because of ill treatment, either to him personally or to his spouse, parents, children, or brothers or sisters. The employer will not be absolved of this responsibility when such ill treatment is by his relatives or subordinates who act with his consent or tolerance.

Another provision nullifies any clause of a contract of employment that waives these rights. Still another provision protects the employment rights of women, requires special consideration for them during the last three months of pregnancy, and grants them a month's leave with pay after giving birth.

The rights to strike and to lock out are protected in Section XVII of

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[5] *Ibid.*

Article 123. Section XIX, however, defines as the only lawful type of lockout one where "an excess of production makes it necessary to suspend work in order to maintain prices within the limits of cost, given prior approval of the Board of Conciliation and Arbitration."[6]

For present purposes these were the important substantive provisions of Article 123 of the 1917 Constitution dealing with job security. Procedural complications were introduced by the fact that in the final draft Article 73, defining the legislative powers of the Federal Congress, did not give it the power to enact labor legislation. The preamble to Article 123 provided that "the Congress of the Union and the Legislatures of the States shall enact labor legislation, based on the needs of each region, without contravening the following standards . . . ," but the federal power was limited to legislation for the Federal District and Territories. Until Article 73 was amended in 1929 to give exclusive power to enact labor legislation to the Federal Congress, such matter was left to the states. Indeed, though several states established state boards of conciliation and arbitration, or special labor courts, no federal labor court was established until 1927.

Sections XX, XXI, and XXII, both procedurally and substantively, gave rise to extended legal controversy. The first problem to arise was procedural, involving conflicts between the jurisdiction of the labor courts and that of the ordinary courts. By a decree of March 8, 1918,[7] in a case coming from the Yucatan Labor Court, the Supreme Court held that the jurisdiction of the labor courts was limited to collective conflicts of the kind referred to in Section XX as "conflicts between capital and labor," and that the ordinary tribunals had exclusive jurisdiction over matters arising out of individual contracts of the kind referred to in Section XXII. Reference was made to Article 13 of the Constitution which provides that "no person may be judged by private laws or special tribunals. . . ."

However, in 1924[8] the Supreme Court reversed itself, holding that the labor courts were not special tribunals within the meaning of Article 13 and that they had exclusive jurisdiction over all conflicts between capital and labor, collective or individual, including those arising out of the application of Section XXII. This has remained the jurisdictional situation.

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[6] In general, the right to strike is limited only in that its purpose must be "to attain equilibrium between the several factors of production, harmonizing the rights of labor with those of capital." Further, a strike may become unlawful if a majority of workers engage in acts of violence against persons or property, and in wartime strikes against government establishments or services are forbidden. Statute law and jurisprudence also require that certain procedures be observed, failing which the strike may be declared "inexistent" with certain legal consequences

[7] Amparo Guillermo Cabrera, Semanario Judicial, II, 773.

[8] Amparo "La Corona" Cía. Mexicana Holandesa S.A., Semanario Judicial, XIV, 492.

The meaning of the option given employers in Section XXI to refuse to submit to the jurisdiction of the labor courts, or to refuse to accept their awards, at the risk of payment of an indemnity, and of the option given workers in Section XXII to choose between an action for indemnity or an action for fulfillment of the contract, in cases of unjustified dismissal, gave rise to long and complex controversy. Ultimately, it produced a constitutional change and amendment to legislation in 1962.

There seem to have been two facets to the controversy. The first was concerned with the relation of the three relevant sections of Article 123. The question may be put as follows. Did Section XXI modify only Section XX, or both XX and XXII? If it were held to modify only Section XX, which relates to "conflicts between capital and labor,"[9] then it would follow that in such disputes the employer might refuse to submit to arbitration or refuse to accept an award. If he elected to do so, he would thereby sever the contracts of employment of his workers and owe them the indemnity specified. However, no such option would be open to him to refuse to abide by an award under Section XXII for enforcement of an individual contract of employment in a case of unjustified dismissal. If it were held also to modify Section XXII, then it would follow that though a worker might elect to sue for fulfillment of the contract, taken to mean reinstatement, as an alternative to a suit for damages, the employer retained the right to refuse to abide by the award, liquidating his obligation under it by payment of the three months' wages and the sum assessed as the "responsibility of the conflict."

The second facet of the dispute involved the familiar doctrine of the impossibility of enforcement of an obligation to do or refrain from doing. This doctrine became incorporated in Mexican law through Roman law and its association with humanistic philosophies. With respect to forced labor, it finds specific expression in Article 5 of the Constitution providing that so far as the worker is concerned, failure to fulfill his contract gives rise only to civil responsibility and that "in no case may compulsion be exercised on his person."

There is no other constitutional expression of the doctrine, though the Civil Code does provide affirmatively in Articles 2104,[10] 2027, and

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[9] The meaning of this phrase is not entirely clear. In the controversy over the jurisdiction of the labor courts, it seemed to be taken to mean conflicts of interest, in contrast to juridical disputes over contracts, individual and perhaps collective, which until 1924 were reserved to the jurisdiction of the ordinary courts.

[10] Formerly Article 1949.

2028 that failure to fulfill obligations to do or not to do shall be compensated for by damages, or by having the act done by another at the expense of the debtor.

In 1929, prior to the enactment of a federal labor code, the Supreme Court held that Section XXI applied both to collective and to individual disputes. In the latter type, if the employer refused to abide by an award sustaining a worker's claim for reinstatement, his failure to perform this "obligation to do" was resolved into the obligation to pay the statutory indemnity of three months' wages, plus the "responsibility of the conflict," which the Court held in the 1929 case to be an additional three months' wages.[11]

Dismissal under the Federal Labor Law

In 1931 the Federal Congress, pursuant to the constitutional amendment of 1929 giving it specific and exclusive power to legislate in effectuation of the provisions of Article 123 of the Constitution, enacted a federal labor code. That law, in Article 121, lists those specific and individual causes for which an employer may lawfully rescind an employment contract,[12] providing in the last paragraph that for similar causes,

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[11] Amparo Cía. de los Ferrocariles Nacionales de México, Sept. 14, 1929, quoted at length in Roberto Girón González, *Applicabilidad de la Fracción XXI del Artículo 123 Constitucional a los Casos de Acción de Cumplimiento de Contrato* (México, D.F.: Universidad Nacional Autónoma de México, 1959), p. 75.

[12] The listed causes for dismissal are:

1) Falsification of certificates or references, provided by the worker or the union proposing his employment, with respect to ability, aptitude, or skill, provided the rescission is within thirty days of employment.
2) Dishonesty, acts of violence, threats, insults, or mistreatment of the employer, his family, or supervisors, during work.
3) Similar acts against fellow workers having as a consequence impairment of discipline at the workplace.
4) Similar acts against the employer, his family, or supervisor while not at work, provided they are of such gravity as to make impossible fulfillment of the contract of employment.
5) Intentional and material damage to buildings, works, machinery, instruments, raw materials, or other things related to the job.
6) Unintentional damage caused solely by negligence.
7) Jeopardizing the safety of the workplace or persons there by imprudence or inexcusable carelessness.
8) Acts of immorality at the workplace.
9) Revealing trade secrets or similar information, resulting in damage to the enterprise.
10) More than three unexcused and unjustified absences in one month.
11) Unjustified disobedience related to the contracted employment.
12) Manifest refusal to adopt preventive measures or to follow indicated procedures for the prevention of accident or illness.
13) Appearing at work drunk or under the influence of narcotics or drugs.
14) Failure to fulfill the contract of employment by reason of imprisonment as the result of execution of a sentence.
15) By declaration of the labor court following imprisonment in accordance with terms of Article 116, paragraph 9 (see below p. 84).

This list is as the law was amended in 1962 and differs in some respects from earlier of equal gravity and similar consequences, rescission is lawful. Article 122 then provides that the employer incurs no responsibility for a dismissal for any of the listed causes. However, if he fails to establish the lawful cause, the dismissed worker is entitled to three months' wages[13] plus back wages to the compliance, the final judgment being "without prejudice to the other actions which may pertain for having been dismissed without just cause."

Article 600 of the Federal Labor Law provides that if the award of the labor court contains an obligation to do something which is not fulfilled, the creditor may either have it done at the expense of the debtor or may choose damages in compensation for the failure to comply. With particular reference to this article, the law's "Exposition of Motives" accompanying its submission to Congress applied to labor law the civil doctrine that "obligations to do" cannot be specifically enforced.[14]

Article 601 repeats the language of constitutional Section XXI, providing that if an employer refuses to submit to arbitration or to comply with an award, the labor court shall order him to pay three months' wages and shall fix the responsibility. Article 602 defines the responsibility as twenty days' wages for each year of service in cases of contracts of indefinite term, with a somewhat different formula for contracts of definite term.

However, the enactment of these terms of the Federal Labor Law did not settle the controversy over the options granted by the Constitution. It remained clear that the worker unlawfully dismissed could sue for fulfillment of the contract—this seems to be the meaning of the saving clause of Article 122 preserving other actions. It was still not clear whether Article 601 applied to unjustified individual dismissals or whether reinstatement was an "obligation to do" within the meaning of Article 600, for if it were, Article 600 might conflict with Section XXII of the Constitution.

In 1936, indeed, the Supreme Court reversed its previous position, now holding that Section XXII modified the right given the employer to refuse to arbitrate or to abide by an award in favor of a worker who

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versions. In the amended version, this section became Article 122, and the several sections discussed immediately below were substantially amended, as appears later.

[13] The 1931 law made no specific reference to the constitutional indemnity of three months' wages, referring only to the right to back wages. An amendment of December 31, 1955, altered this article to its present form; the 1962 amendments became Article 123. There are also changes in language not relevant to the present discussion.

[14] See Alberto Trueba Urbina, *Ley Federal del Trabajo Reformada* (34th ed.; México, D.F.: Porrúa, 1962), annotation to Article 600, p. 235. Trueba Urbina holds this application of civil law doctrine to be in error.

sought reinstatement after unlawful dismissal.[15] Hence, a dismissed employee could be required to be reinstated. Finally, in 1941, the Court returned to its pre-1936 position.[16] Referring to Article 600 of the Federal Labor Law and to the "Exposition of Motives" with its reference to the doctrine regarding an obligation to do, the Court said: "... to reinstate a worker must be enforcement of an obligation to do.... It must also be accepted that as to obligations to do, forced execution is impossible. Legal doctrine as well as our general law [*derecho común*] and the antecedents of the Federal Labor Law, like the law itself, accept this premise."[17]

Until the end of 1962, this remained the situation with respect to the right of an individual worker to protection from unjustified individual or disciplinary dismissal. He could elect to sue for damages, in which case he was entitled to three months' wages as indemnity, or he could elect to sue for reinstatement. But if he obtained an award directing reinstatement, the employer could elect to refuse to abide by the award, in which case the worker became entitled to twenty days' wages for each year of service in addition to the three months' wages.

Mexican law deals fairly simply with the question of burden of proof. A worker seeking a remedy against allegedly unlawful dismissal must establish the existence of a contract of employment and the fact that he is no longer working. It lies then upon the employer to prove that he had legal cause for dismissal or that the employee actually abandoned his employment.[18]

Affirmation of the Right to Reinstatement

In 1962 Mexican labor law took an additional step which represented a more radical departure from its civil law antecedents. The Constitution and the Federal Labor Law were amended to provide clearly and specifically for reinstatement of unjustly dismissed workers under many circumstances. Thus, the long controversy over the meaning of the several sections of the Constitution was resolved in favor of the principle that a worker had a kind of title to a job of which he could not be deprived by mere payment of damages.

The Federal Congress in 1961 passed and submitted to the states for ratification amendments to Sections XXI and XXII (along with certain other amendments not relevant here) providing that (1) the right of an employer to refuse to submit to arbitration or to abide by an award did not apply to the circumstances described in Section XXII, namely, the right of a worker dismissed without just cause to choose between damages or fulfillment of the contract; and (2) that the law would specify the cases in which an employer would be exempt from the obligation to fulfill the contract, paying damages instead. These constitutional amendments were ratified by the states, and the changes were declared in effect by the 1962 session of the Congress. That session then proceeded to amend the Federal Labor Law to provide the exceptions, with the new law becoming effective on December 31, 1962. A new Article 124 provides that the employer may elect damages in lieu of reinstatement only in the cases of:

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[15] Girón González, *op. cit.*, p. 76.

[16] The 1936 decision came after creation, in the Cárdenas regime, of the Labor Chamber of the Supreme Court. The 1941 decision came after a change in the personnel of the Court.

[17] Girón González, *op. cit.*, p. 79.

[18] See *Legislación sobre Trabajo* (6th ed.; México, D.F.: Ediciónes Andrade, 1960), Article 122, p. 163, and cases cited, p. 166. Also, Trueba Urbina, *op. cit.*, annotation, p. 415.

1) workers with less than two years' seniority
2) workers proven to the labor court to be in such direct and permanent contact with the employer that continuance of normal work relations is impossible
3) apprentices
4) employees holding positions of confidence[19]
5) domestic help
6) temporary workers

The constitutional amendments were proposed by the López Mateos administration and passed, allegedly, without any consultation with employer groups.[20] Various reasons were given for the amendments. It was alleged that the Supreme Court had altered the original intent of the Constitution.[21] The *Dictamen,* or Committee Report to the Chamber of Deputies, argued that stability in employment was one of the fundamental rights of the workingman, necessary to assure the other rights which the law gives the proletariat. The reform was held to be necessary to protect the elderly worker against dismissal without just cause since damages could not really indemnify him, and also to assure adequate union representation by preventing reprisals against unionists by employers willing to pay the price.[22]

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[19] *Puestos de confianza,* which generally means not only confidential employees, but also managerial and supervisory workers.

[20] See *Labor Lex,* the Information Bulletin of the Confederación Patronal de la República Mexicana, Jan. 30, 1962, pp. 1, 4.

[21] Speech of Representative Joaquín Gamboa Pascoe, *Diario de los Debatos de la Cámara de Diputados,* Dec. 28, 1961.

[22] H. Cámara de Diputados, XLV Legislatura de la Unión, *Dictamen de las Comisiones Unidas Primera de Puntos Constitucionales y Primera de Trabajo relativo a la Iniciativa de Ley que Reforma las Fracciones II, III, VI, IX, XXI, XXII y XXXI del Inciso "A" del Artículo 123 Constitucional....*

The Secretary of Labor, Salomón González Blanco, supported the constitutional change in somewhat more general terms. He argued that in the post-World War II period it had become apparent that a hiatus existed in the concept of social security. While social insurance provided a certain protection against the risks which deprived the worker of his ability to work and earn, in his job he had no "social security" for his present and future. This could only be provided by preventing his arbitrary dismissal. "The paradox results that the workers benefit, by way of social security, when they no longer are able to work, but on the other hand, when they place their physical energy and intellectual capacities at the service of another, they are exposed to arbitrary or capricious dismissal."[23]

The Secretary also pointed out that under Mexican custom and collective agreement, workers progress up the job ladder by way of seniority. Arbitrary dismissal, then, not only deprives them of the accumulated benefits of their seniority in the enterprise but also requires them to start in a new enterprise at the bottom both in job and wage. Such injustice, the Secretary believed, could not be redressed merely by damages.[24]

Many employers and employer groups were outraged at the concept of compulsory reinstatement of dismissed workers. Their protest, generally, went to the principle of interference in the traditional right of an employer to terminate a contractual relationship with the worker.[25] Procedurally, employers alleged the difficulty, under the doctrine of burden of proof, of establishing such offenses as sabotage, deliberate slowdowns, or insulting behavior in the absence of witnesses. They argued that it would be impossible for them to rid their plants of subversives, corrupt labor leaders, or communists.[26] Further, it was claimed that compulsory reinstatement would discourage investment, both national and foreign, and would reduce the efficiency of enterprise not only by preventing the employer from getting rid of inefficient workers but also by encouraging inefficiency on the part of workers wed to the firm.[27]

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[23] Secretaría del Trabajo y Previsión Social, *Reformas a las Fracciones II, III, VI, IX, XXI, XXII, XXXI del Inciso "A" del Artículo 123 de la Constitución Política de los Estados Unidos Mexicanos* (México, D.F., 1962), p. 29 (translated by the writer).

[24] *Ibid.*, p. 30.

[25] See speech of Lic. Baltasar Cavazos Flores, "Reformas al Artículo 123 Constitucional," Confederación Patronal de la República Mexicana, Feb. 1, 1962 (mimeo). Lic. Cavazos Flores is legal adviser to the Confederación.

[26] *Labor Lex, op. cit.*

[27] *Voz Patronal,* Vol. III, No. 6, May–June 1962. See also "Perniciosos Efectos Inmediatos del Proyecto de Reformas al Artículo 123 Constitucional," Servicio de Prensa Confederación Patronal, Boletín Núm. SPCP-34/62, Feb. 1962.

Despite these protests, employers were faced with the fact of the sudden proposal and rapid passage of the constitutional amendments. They turned then to proposals which would minimize their effects. Specific legislation was called for to enumerate those cases in which employers would be exempt from the obligation to reinstate. Proposals were made to except the specific classes of workers ultimately excluded, as described above, except that workers with less than ten years' seniority instead of less than two would have been excluded. Also, it was proposed that small firms, defined, for example, as those with less than seventy-five employees, should be exempted.[28]

What the effect of the legislation finally adopted and summarized above will be, of course, cannot yet be determined. There can be no doubt that most Mexican employers are dismayed at the prospect of having to continue unwanted workers in their employ. When interviewed by the writer, some held that the reform would necessitate the maintenance of a private internal police force to spy on employees in order to assure the ability to prove offenses. Others said simply that they would be willing to pay enough to workers seeking reinstatement to induce them to leave. A few said that they would, of course, have to accept workers ordered reinstated, but that they did not see how it could possibly work.

Union leaders seemed principally interested in protecting their institutional activity. In general, they felt that the most important feature of the law was that employers could no longer choose to buy out their obligation to refrain from discrimination against unionists or strikers. At least one informant said that the most beneficial effect would be to rid the worker of venal lawyers or union representatives who kept for themselves or split with their employer counterparts a very large part of the judgments or settlements for improperly dismissed workers. Under the new law, workers would seek reinstatement instead of money judgments.

Judging by experience under the preceding law, the effects of the change are not likely to be radical. In the past many workers have elected to sue for the three months' legal indemnity rather than for fulfillment of the contract for fear that they might be offered an opportunity to return to their old jobs. This was attributed to a combination

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[28] Lic. Baltasar Cavazos Flores, "La Estabilidad en las Relaciones Laborales," Confederación Patronal de la República Mexicana, June 1962 (mimeo). Lic. Agustín Reyes Ponce, "Estudio sobre la Reinstalación Obligatoria," Confederación de Cámaras Industriales de los Estados Unidos Mexicanos, June 1962 (mimeo). The Secretary of Labor suggested that small firms should be exempted by provisions dealing with cases of personal and direct contact between worker and employer. *Op. cit.*, pp. 32–33. Such provisions were included in the law as passed.

of fear and of desire for a large lump sum. A representative of the nationalized oil company, which is probably a special case, indicated that few instances of legal reinstatement ever arose under its collective agreement, which waived the right of the employer to elect damages. Most cases, it was explained, were settled in the grievance procedure, and the few that went to court were for damages rather than for reinstatement. The textile section of the Federal Labor Court handles large numbers of damage suits, according to its secretary, despite the availability of reinstatement under the collective agreements in some segments of the industry. Older workers, union activists, and a few others may seek reinstatement under the new law.[29] Employers may exercise more care in discipline. More cases may be settled before reaching the courts, and the bargaining power of workers in reaching agreed money settlements may be substantially enhanced. But the law will probably produce no really radical change in Mexican practice.

Nevertheless, the new legislation represents a most significant step in the evolution of Mexican law, coming as it does out of the tradition of liberalism and the Civil Code. Legally it represents a final departure from the purely contractual conception of the employment relation, giving to the worker, at least formally, an established and continuing right to his job, so long as that job exists. In formal terms, with the class exceptions noted, it places the Mexican worker in generally the same situation with respect to his right to his job as are those U.S. workers protected by effective "just cause" provisions of collective agreements, except that in Mexico the specific causes which justify dismissal are enumerated.

Reductions in Force under the Federal Labor Law

The Federal Labor Law deals extensively with other problems related to continuity in employment. It will be remembered that the Constitution defines as lawful "lockouts" only those in which mass dismissals result from inability to maintain a price level covering costs.[30] Article 116 of the Federal Labor Law implements this provision by providing that lawful causes for temporary suspension of the contract of employment, without employer responsibility, are:

1) Lack of raw materials, so long as the employer is not to blame for the lack.

2) Lack of funds, and the impossibility of obtaining them, for the

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[29] It was said in interviews, however, that older workers often volunteer for reductions in force because of the large lump sum indemnity to which they are entitled.

[30] The constitutional provision is repeated in Article 278 of the Federal Labor Law.

normal conduct of activity, provided the employer can prove these circumstances.

3) Excessive production in a particular enterprise relative to its economic circumstances and the condition of the market.

4) Clear and manifest unprofitability of production in a particular enterprise.

5) *Force majeure,* or a chance event not attributable to the employer, when a necessary, direct, and immediate consequence is the suspension of work.

6) Failure on the part of the state to pay the sums it has obligated itself for to firms with which it has contracted for work or services, provided these sums are indispensable.

7) The fact that the worker has contracted a contagious disease.

8) Death or incapacity of the employer when a necessary, direct, and immediate consequence is the temporary suspension of work.

9) Failure on the part of the worker to fulfill the terms of the contract of employment because of arrest and sentence, or arrest imposed by judicial or administrative authority, if the labor court with jurisdiction has not already rescinded the contract.

In the circumstances described in 1, 2, 3, 4, and 6, which compose the lawful economic reasons for layoffs, the employer is required to obtain *prior* approval of the labor court before he can suspend the contracts of employment without incurring legal responsibility. This requirement has important consequences in practice, as will be shown later.

Section XXII of Article 111 of the Federal Labor Law requires that in layoffs the employer shall respect seniority rights and, other things being equal, shall give preference for continued employment to union members. Article 120 requires that on resuming operations he must notify his former employees and must re-employ them at their former jobs provided they present themselves within the time limit set by the employer, which may not be less than thirty days.

In addition, it should be noted that the employer may not replace workers who are out on a lawful and "existent" strike, so that in effect their contracts of work are suspended for the duration of the strike.

The Federal Labor Law makes provision for lawful termination of the contract of employment, including certain economic circumstances which permit the employer to end the employment relation. Among these are bankruptcy or liquidation proceedings, and "complete closure of the enterprise, or definitive reduction of work."

The statute does not establish criteria for distinguishing between temporary reductions in force for economic reasons and "definitive reduction of work." Furthermore, Article 126, which refers to terminations, does not specifically require prior authorization from the labor court. However, Article 579, which establishes procedures for hearing economic or collective disputes arising under Section XXI of the Constitution, refers specifically to that section of Article 126 dealing with closures and definitive reductions in force. The Article 579 procedure requires, in effect, prior approval of the labor court before the employer may act without legal responsibility. This congerie of provisions has, therefore, been construed to mean that the employer cannot either close his enterprise for economic reasons or permanently reduce his work force without prior approval of the labor court[illegible] unless he is willing to accept the consequences, which will be discussed below.

A final important provision of the Federal Labor Law relating to reduction in force is concerned with technological change. Article 128 provides that if it is necessary to reduce forces because of new machinery or new processes, the contracts of the affected workers may be terminated, but they are entitled to an indemnity equal to three months' wages, plus twenty days' wages for each year of service.[illegible]

The important reference of the foregoing provisions is to workers employed for indefinite term. It is the deliberate purpose of Mexican labor law to restrict employment for either fixed term or for specific work, though provision is made for employment contracts of these types in Article 39 of the Federal Labor Law. Article 24, however, specifically limits such a contract to situations where the nature of the employment requires it. Furthermore, if at the end of the contract term, the causes which gave rise to the employment in the first place still exist, the contract continues despite its specific terms.

Summary of the Law

In sum, then, according to Mexican labor law, an employer must have just cause for the dismissal of a worker individually. The dismissed worker has a choice of two actions: to sue for damages equal to three months' wages or to sue for reinstatement. Until recently, however, if he chose the latter course, the employer could opt to pay damages equal to three months' wages plus twenty days' wages for each year of service, since it was held that the law did not require specific enforcement of the right to reinstatement.

[illegible] See de la Cueva, *op. cit.*, I, 847, and case of José Cantú Leal, cited there and on previous page. See also cases cited in Trueba Urbina, *op. cit.*, pp. 111–12.

[illegible] Under the original law of 1931 this was only three months. In 1956 it was changed to its present form.

In the event of reduction in force for the economic reasons set forth in the law, the employer must seek prior approval of the labor court. If he does not, the dismissals subject the employer to legal responsibility, defined in Article 602 as three months' wages plus twenty days' wages for each year of service. Similarly, the worker dismissed because of the introduction of new machinery or processes is entitled to the same indemnity.

The Law in Practice

Dismissals

The 1962 constitutional and statutory provisions for reinstatement established in Mexican law the bases for the kind of protection against arbitrary individual discharge which is characteristic of the organized firm in the United States. It is too soon to assess the impact of the new law. Nevertheless, a few observations on the operation of the prior provisions and on employer, worker, and union attitudes toward the problems may be enlightening. These observations derive from interviews with employer and union representatives, attendance at numerous sessions of the Federal Labor Court in Mexico City, and conversations with scholars and other informed persons. Neither time nor circumstances permitted a formal examination using sampling techniques, attitude questionnaires, or other paraphernalia of "scientific" investigation.

The first observation is that whatever may have been the source of the legal protection of workers against dismissal—whether founded upon real popular demand or upon an intellectualized view of what workers ought to want—industrial workers in Mexico City, and probably in the other major industrial centers, have a rather good idea of what their rights are. Certainly they lack detailed knowledge of the law; but they do know that their employers are not entitled to dismiss them at will or upon false or minor pretexts. A day spent in the office of the *Procuradoría de Trabajo,* a sort of workers' Public Defender, in the labor court for cases within the jurisdiction of the Federal District will quickly convince one of the general awareness of legal rights. This office takes cases that are not within the federal jurisdiction, including therefore employees of many small employers. There seem to be no official statistics on the cases handled by the *Procuradoría,* but it is immediately apparent that large numbers of workers come to it for advice and assistance after some kind of altercation with their employers. The halls are filled with men and women, young and old, awaiting their turn for an interview with one of the officials.

Second, there are clearly a number of variables that influence the real effectiveness of the legal protections. The first and perhaps the most important is the character and effectiveness of the union, if any, representing the employees. Mexico has about 1.3 million union members out of a labor force of about 10.7 million. However, of the nonagricultural labor force of some 4.4 million, approximately 1.2 million are union members. Further, of about 1.7 million persons in manufacturing, construction, the extractive industries, and public utilities (excluding transportation), about 0.8 million are organized.[33] In addition, rail transportation is completely unionized. Thus, the modern industrialized segments of Mexican industry are highly organized. And, though data do not exist, it is apparent that the large industrial enterprises are generally unionized.[34]

Mexican law strongly favors the establishment of collective bargaining, but the structure of the Mexican trade-union movement is very diverse. Though the majority of union members are in unions affiliated with the Confederación de Trabajadores de México (CTM), other centrals exist, as well as large numbers of unaffiliated unions, including many whose members are limited to the employees of a single employer.

Mexican law permits the closed shop, in the strict sense of an agreement that prospective employees must be members of the union before hiring, and must retain their membership as a condition of employment. Such agreements are virtually universal, even in manufacturing. The Mexican union, therefore, can exert a high degree of control over the individual employee. Despite the accessibility of the labor court, it is able, if it wishes, effectively to enforce upon the individual member agreements made in the grievance procedures, which, in somewhat sketchy form, are characteristic of Mexican collective agreements. It seems fairly common for compromise agreements to be made, without litigation, under which a claim of unjustified dismissal is settled for less than the statutory indemnity. In an industry such as textiles, for example, in which the union controls access to all jobs,[35] the unwilling grievant refuses to accept such a settlement at the risk of loss of job opportunity in the industry. This form of sanction, of course, is not important where the union extends only to the boundaries of a particular firm.

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[33] See *Manual de Estadísticas*, Primer Congreso Nacional de Relaciones Industriales, México, Nov. 1962. These data are as of 1960.

[34] See *The Part Played by Legislation and Collective Bargaining in Determining Working Conditions and Settling Labor Disputes* (Geneva: International Labor Office, 1960). Citing two Mexican sources, the report of the Inter-American Conference on Labor-Management Relations, Montevideo, Nov. 3–12, 1960, states: "It has been said that there is at present hardly any undertaking or industry of any importance that is not covered by collective agreement. . . ."

[35] Mexican law provides for the extension of collective agreements, under which the agreement becomes obligatory, or *contrato-ley*, throughout the industry. Such extended agreements obtain in rubber, sugar, and the several textile industries. The nationalized railroad and petroleum industries also have industry-wide agreements.

Many unions provide legal assistance to members in prosecuting claims against employers for unjustified dismissals, as well as in other kinds of cases. The aggressiveness with which the union lawyer, or for that matter a private lawyer, presses his client's claim has great influence on the outcome.

Procedure before the labor court requires an effort at conciliation before formal hearing of a case. This conciliation is usually informal, and is conducted in the halls of the court by one of the judges, not necessarily the government representative. Apparently, large numbers of dismissal cases are settled before formal hearing by negotiation between worker and employer counsel, sometimes with the help of the conciliating judge. Such settlements frequently involve payment of sums less than the legal indemnity. Compromise settlements are also reached in the office of the *Procuradoría*. How much the worker gets often depends upon the vigor and honesty of his representative.

Clear-cut abuses do exist, though how widespread they are could not be determined. One type mentioned by union representatives was an alleged practice requiring workers, upon employment, to sign undated resignations.[30] These, of course, would be null if shown.

In the light of the recent changes in the law which make effective the worker's option to sue for reinstatement, one apparent pattern in the administration of previous law seems significant, and is revealing of worker and employer attitudes toward their relation. Observation at the labor courts showed that, in most of the individual dismissal cases heard during these visits, the worker had chosen to sue for the indemnity of three months' wages, rather than for fulfillment of the contract (reinstatement). On its face this did not seem to be a rational choice. For if the employer was prepared to reinstate the worker upon an award in the latter's favor, the implication was that the worker was willing to sell his job for three months' wages. On the other hand, if the employer elected not to abide by a reinstatement award, the indemnity to the worker would be larger by twenty days' wages for each year of service. In some cases this would have amounted to a substantial sum.

Earlier discussions with employers or their representatives about the proposed changes in the law had revealed that to many Mexican employers resumption of their relationship with workers whom they had dismissed, rightly or wrongly, was extremely undesirable. The analogy of a broken marriage was frequently used. It seemed, then, that even if the worker wished to sell his job, he took little risk in putting the higher of the two possible prices on it.

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[30] See also the story on alleged abuses by Sears, Roebuck de México in *El Día*, Aug. 23, 1962. Here it is alleged that the company forced employees to admit culpability for offenses they had not committed, then dismissed them without indemnity.

Reinstatement, though rare, was not completely unknown under the old law. In both the nationalized petroleum and railroad industries the employer waived his right to pay an indemnity in lieu of obedience to a reinstatement award, and, according to union and employer representatives in these industries, such awards are occasionally rendered and complied with.[37] Furthermore, reports of the federal conciliation service indicate occasional agreements obtained to reinstate dismissed workers.[38]

The value of the job to the Mexican worker is measured not only by the risk of inability to find another in an economy with large unemployment and underemployment, but also by the fact that Mexican industrial practice resembles the American in its high emphasis on seniority. The law and most collective agreements require layoff and recall in accordance with seniority. Opportunity for promotion is governed by seniority under most agreements, and other benefits often depend upon length of service, for example, pensions and length of annual vacations. It should be noted, however, that the value of a particular job to a highly skilled worker is lessened because of the great scarcity of advanced industrial skills.

Two reasons were frequently given for the choice of workers to sue for three months' wages rather than for reinstatement. The first was simply fear. Many workers seemed to be afraid that if they sought reinstatement it would be offered them; then management and their supervisors would make life on the job unbearable for them, forcing them to quit, or would find a better pretext for later dismissal. They had no confidence in the ability of their union or their fellow workers to protect them from this kind of discriminatory treatment, or in the willingness of their employers to re-establish a viable relationship.

Second, it was said that many urban workers really wanted the lump sum payment and so would not risk compliance with a reinstatement award. For many workers, whose daily requirements consumed their entire pay, three months' wages in a lump sum loomed very large, outweighing the risk of extended unemployment and loss of the benefits accruing with seniority. Some may even have had the illusion that such a capital sum might be sufficient to start them as entrepreneurs in a small business.

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[37] De la Cueva thought that negotiation of such waiver clauses was the solution to the problem of refusal of the courts to enforce specific performance of reinstatement, and, by implication, believed such waivers to be legally effective. *Op. cit.*, I, 828. But see Euquerio Guerrero, *Manual de Derecho de Trabajo* (México, D.F., 1962), II, 378–79. After noting that several agreements contain such waivers, Guerrero doubted their effectiveness since, in his view, the right waived is procedural and of a public nature which cannot be waived under Mexican law.

[38] See Secretaría del Trabajo y Previsión Social, *Memoria de Labores*, 1962, pp. 25–26; *ibid.*, 1960, p. 38.

Reductions in Force

The provisions of the Federal Labor Law dealing with general reductions in force are demonstrably of great effect. They require the employer to obtain permission from the labor court with jurisdiction before making reductions for economic or market reasons. Such an application may become the subject of an "economic conflict," that is, the workers, through their union, may protest the proposed reduction. It then falls upon the employer to prove that one of the statutory reasons which permit such reduction actually obtains.

Articles 570–583 of the Federal Labor Law prescribe the procedures to be followed in a case of economic conflict. These include a requirement that the labor court attempt to maintain the status quo during the procedure; an initial hearing; the appointment of a board of experts, assisted by assessors named by the parties, with full authority to investigate; a report by the experts; a hearing on objections of the parties; and finally an award.

Obviously this procedure can be extremely time-consuming. According to the law, the experts must render their report in not more than thirty days. However, as Guerrero says:

> Theoretically, the law requires, in Article 574, that the experts must render their report within a maximum period of thirty days. We do not believe that this normally happens. On the contrary, we know of many instances in which economic cases have stagnated for months and even years before the report was finally rendered.[39]

A certain number of cases do at least begin the statutory procedure. Some are settled by the mediatory efforts of the special federal corps of conciliators.[40] Others reach agreed settlements at some point in the labor court procedure.[41] But it is apparent that most instances of reductions in force for economic reasons do not go through the statutory procedure.

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[39] *Op. cit.*, II, 389 (translated by the writer). There is a seldom used procedure in Articles 581–583 for "urgent cases."

[40] See the sections on the conciliation service in any recent *Memoria de Labores* of the Secretariat of Labor and Social Security.

[41] See lists of cases of economic conflicts in section on Juntas Federales in *ibid.* But note the relatively few cases of this type reaching the courts. In 1961 there were fifty, of which seventeen were closures because of *force majeure*, and only eight were temporary total or partial "suspensions." It must be remembered that these were only federal cases.

Both the Constitution and the Federal Labor Law specifically provide that, in cases of economic conflict, if the employer refuses to go to arbitration or to abide by the award, the contracts of employment involved are terminated, and the workers are entitled to three months' wages plus "the responsibility of the conflict," defined as twenty days' wages for each year of service. It appears to be the quite general practice, specifically recognized in most collective agreements (see p. 96 below), that employers in fact pay this indemnity rather than go through the statutory procedure. Given the opportunity for workers and their organizations to prolong the statutory processes, and the fact that the layoffs cannot take place until approved, it is probably, on the average, less costly for employers to pay the indemnity than to enter a long process whose outcome is uncertain.

In smaller and weaker firms, where for financial reasons the chances of recovery for improper reductions in force are small, settlements may be reached for indemnities less than those provided by the law. Such compromises are perfectly lawful, and undoubtedly happen frequently.

If employers were able generally to make reductions in force without liability for indemnity, distinctions between reductions for economic reasons and dismissals because of technological changes might create serious legal problems. It will be remembered that the Federal Labor Law requires an indemnity to workers displaced by new machinery or new processes equal to three months' wages plus twenty days for each year of service. Since in practice the same indemnity is paid in each case, no difficult problems of interpretation seem to have arisen.

Other practices have developed, perhaps stretching the literal provisions of the law, to ease somewhat the burden of regulation of reductions in force on the employer. Though, as previously noted, Mexican law gives strong preference to contracts of indefinite term, which are not terminable except for good personal or economic cause, it also provides for contracts of definite term and for definite work. These are, however, restricted in that, whatever may be the terms of the employment contract, the worker must be allowed to continue in employment so long as the causes giving rise to his initial employment continue. Nevertheless, a widespread practice exists in Mexican industry of hiring workers designated as "seasonal" or "casual" in contrast to permanent employees. Many collective agreements regulate the proportion of each type, and specify the procedures by which casual or seasonal workers may become permanent.

Obviously in many kinds of situations, as, for example, harvest in the sugar industry, the contractual relationship is properly for the season, or for fixed work. No problem of evasion exists where the work is truly seasonal and comes to a definable end. Certain kinds of legal problems do arise concerning the re-employment rights of workers from season to season, but these are secondary.

On the other hand, one gets the strong impression that the designation of casual workers, and sometimes of seasonal workers, is evasive of the law and a device to avoid the responsibilities owed under contracts of indefinite term. For example, a widespread practice exists of designating as casual workers those who are available to fill the jobs of permanent workers absent, ill, or on vacation. It happens with some frequency, according to union representatives, that "casual" workers are used to absorb temporary fluctuations in production for a variety of reasons, presenting themselves for work daily and being offered or denied it depending upon the needs of the day.

On a larger scale, a collective agreement was signed between the textile workers' union and a particular firm, covering only the third shift, put on to produce cloth for a large order received. This collective contract, and presumably the workers employed under it, was for fixed work and was intended to end when the order was filled and the shift ended. There is specific provision for such contracts in the extended industry-wide textile agreement,[42] and the practice is usual.

One author describes as a legitimate use of casual workers the hypothetical case of a paper box factory which has permanent workers sufficient for its "normal production," but which receives an order for a quantity in excess of its output. It then hires additional workers who remain only so long as the cause which gave rise to their hiring exists—presumably until the large order is filled.[43]

In the construction industry, of course, contracts of employment typically are for fixed work, but it is a peculiarly Mexican practice that collective agreements are signed also for each job. Mexican legal scholars said in interviews that this necessity arises from the Mexican doctrine that the life of a collective agreement continues only so long as workers are employed under it.

Legally, casual employment is justified as employment for each of a possible series of small fixed jobs. Where these merge into regular employment may be difficult to tell; many employers undoubtedly push this line rather far in order to protect themselves against the possible liabilities of dismissal of regular employees. There are probably also some abuses of the contract for fixed term. One case was found in which an otherwise very careful employer had persons working on year contracts on a job expected to last several years without even being aware of the provision of the law which would forbid him to dismiss these workers if the job had indeed not terminated at the expiration of their contracts.

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[42] See "Contrato para Obra Determinada," Fábrica Santa María de Guadalupe, S.A. y Sindicato de Trabajadores de la Industria Textil, Sección 24, April 21, 1962, registered at the Junta Federal de Conciliación y Arbitraje, and Article 40 of Contrato-Ley for the Textile Industry, 1960.

[43] Leonardo Graham Fernández, "Modalidades del Contrato Individual de Trabajo en Cuanto a su Duración," *Revista Mexicana del Trabajo,* VIII (March–April 1961), 19.

As we have indicated, Mexican law requires the employer to respect seniority rights in layoffs, and to re-employ his former employees when resuming work. But, in the organized firm under the typical closed-shop arrangement, the employer is obligated to accept employees dispatched to him by the union. It then becomes the union's obligation to observe seniority rules and re-employment rights. If the union fails to dispatch an employee with prior rights, it is well established in Mexican law that the union, rather than the employer, is legally liable, and it may be required to pay the employee whose rights were disregarded back wages from the time he should have begun work until he actually begins. Thus the labor court will enforce not only statutory re-employment rights, but also terms of union constitutions which give to unemployed workers once employed in the industry of the union's jurisdiction rights in order of seniority to such jobs as may appear, as well as preference over strangers.

An interesting sidelight on the notion of the job as property and on the legal enforcement of union constitutional provisions relating to allocation of work is a practice prevailing in the oil industry. Under the constitution of the oil workers' union, the widow or child of working age of a deceased oil worker is entitled to job priority for the vacancy created by his death. The specific job is filled from within, in accordance with the seniority provisions of the contract, but the heir is entitled to fill the job opening at the bottom of the ladder after exercise of internal seniority rights. Not infrequently, however, the widow does not want or cannot fill the job and there is no child willing and able to work. In such instances, both union and company informants say, a practice has developed for the sale by the widow of the job right, perhaps with a "commission" to the union functionary who consents to dispatch the purchaser of the right. This, however, is done at the union's risk, since another unemployed member of the union may be entitled to the job. Company attorneys informed me that the union had been held liable by the labor court under such circumstances. However, the power of the union with a closed shop must be a strong deterrent to such form of protest.

Many Mexican employers, like their counterparts elsewhere, chafe under the restrictions of seniority rules, alleging that in layoffs they may require the retention of the less efficient workers.[44] Until the passage of the new reinstatement legislation, there was little sanction other than a moral one to require the employer to adhere to legal and collective bargaining rules requiring layoff in seniority order. In most layoff cases, the employer pays an indemnity to the affected workers, and the amount is calculated on the same basis as the indemnity due a worker dismissed without good cause. With additional liability measured only by the difference in length of service, the employer could choose to dismiss senior workers rather than junior, paying them for improper individual dismissals, and thus evade the rules requiring layoffs in seniority order. The new legislation will make this kind of evasion more difficult if workers elect to sue for reinstatement in the event of improper individual dismissal.

The Role of the Collective Agreement

The Mexican worker's legal rights with respect to tenure in employment are often significantly supplemented by collective agreement. Such additional protection is both procedural and substantive. The following material is based on examination of about forty collective agreements, including all the extended agreements and a group of others largely selected at random from the files of the Federal Labor Court, with which all agreements subject to federal jurisdiction must be registered.

Provisions on Disciplinary Dismissal

The more important additional protections given workers against unwarranted disciplinary dismissal are procedural. Most of the collective agreements examined provided that workers accused of an offense that might warrant dismissal must be given a hearing, usually within forty-eight hours of the charge. At the hearing they must be represented by a union official, and a written record must be made of the proceedings.

Some agreements provide that the worker will not be discharged or suspended until completion of the investigation, though exception is often made for certain offenses warranting immediate suspension. Other agreements provide for possible suspension pending the investigation. In some cases it is provided that if the case against the worker is not proved in the hearing, the worker, if suspended, will be returned to his job. In others, the company is required to pay an indemnity, usually the legal indemnity, in lieu of reinstatement if this is the course it elects.

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[44] See Guerrero, *op. cit.*, I, 240, 362. Guerrero is closely associated with certain employer groups in Mexico.

In a few agreements, the company specifically waives its right to elect damages in lieu of reinstatement if the labor court finds that the dismissal was unjustified. This is the case not only in the nationalized petroleum and railroad industries, but also in the extended agreements in wool and synthetic textiles and in at least one plant agreement. Several other agreements anticipated the changes in the law by providing that, while the company may have the right to pay damages in lieu of reinstatement, this clause will not remain effective if the law is changed.

A few agreements provide for indemnities in excess of the legal ones. The agreement covering pilots in the employ of Aeronaves de México, for example, provides that if the dismissal is found unjustified, the pilot will be entitled to one year's salary plus 100 days' salary for each year of service. A steel company agreement provides for indemnity of 125 days' wages plus 50 days' wages for each year of service.

Substantively, most agreements include clauses dealing with offenses that warrant dismissal. Sometimes these are mere references to the articles of the Federal Labor Law which list lawful reasons for disciplinary dismissal. In other instances, a more restricted list is agreed upon. Often the extent to which repetition of less serious offenses may cumulate to warrant discharge is regulated. One frequent example is a less stringent provision on absenteeism than the law provides. Though legally three unexcused absences in a month justify dismissal, it is common, for example, in the mining industry to allow five in a month before dismissal. Incidentally, there is frequent provision reiterating the requirement of the law[45] that no entry may be made on a worker's personnel record without hearing and proof.

In general, Mexican collective agreements extend the protections afforded by the law against disciplinary dismissals. Such provisions supersede the law on the principle that the law establishes minimum guarantees which may be improved upon by collective agreement.

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[45] Ley Federal del Trabajo, Art. 102.

Collective Regulation of Reductions in Force

As indicated above, the Mexican employer wishing to reduce forces for economic reasons must gain the prior permission of the labor court. If he does so he is not legally obligated to pay an indemnity, but if he does not, he is liable for damages generally equal to three months' wages plus twenty days' wages for each year of service. In case of displacement by reason of new machinery or processes, he must pay the same indemnity, from which there is no escape by obtaining approval of the labor court.

Typical provisions of collective agreements go beyond the protections of the law. Almost invariably the company agrees to consult with the union before making reductions. Certain principles are established, such as that casual workers will be eliminated before permanent workers are laid off. Frequently reduction in hours is given priority over reduction in personnel. Reductions, either in hours or in personnel, must be made according to collectively agreed rules of distribution. Sometimes it is provided that proportionate reductions will be made in positions exempt from the agreement (*puestos de confianza*). Seniority must be adhered to rigidly in most agreements, and explicitly or implicitly is defined as plant seniority.

Most agreements provide specifically for indemnities in the event of a reduction in force. Often workers subject to temporary or short-term reductions continue to receive full pay for specified periods. Workers subject to indefinite, long-term, or permanent reductions are given the right to indemnities of specified amounts, usually equal to the legal indemnities, though occasionally either a little more or a little less.[46] Characteristically casual workers, if entitled to any indemnity, get less than the full possible indemnity under the law. Special protection is often afforded workers near the age at which they would be eligible for pensions.

Often a reduction in force involves demoting some workers, usually by operation of principles of seniority. Some agreements express an interesting concept of the right to a particular job by providing that workers demoted or transferred to jobs paying less than those previously held will be entitled to an indemnity equal, say, to the difference in the daily wage of the two jobs multiplied by ninety days plus twenty days per year of service.

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[46] Since the employer could escape the obligation to pay any indemnity by seeking and obtaining permission of the labor court, a contractual indemnity less than the legal indemnity payable if the employer did not get permission is not a waiver of the worker's legal rights.

The indemnities provided are sometimes payable only if an agreement is reached or if the employer elects not to seek prior permission of the labor court. In some agreements he retains his right to escape the indemnity by getting permission; in others he obligates himself to pay the indemnity even if he seeks and obtains permission.

As to technological change, most agreements simply reiterate the provisions of the law granting severance pay of three months' wages plus twenty days' wages for each year of service to displaced workers. A few provide larger indemnities. Some require that the employer attempt to find other employment for displaced workers, often with an indemnity if the new job is at less pay than the old.

Three patterns appear as to re-employment rights of workers who lose their jobs for economic or technological reasons. One, and perhaps the most common, provides that they retain prior rights to re-employment without qualification, including rehire with full seniority. A variant on this pattern, however, is that if they have been indemnified, they have prior rights, except that when rehired they come in as new workers. A second pattern provides that rehires will be controlled by the union. In such cases, the union rules themselves may provide for observation of company seniority, or other rule, in dispatch of workers. A third, and perhaps the least common, pattern provides that workers who accept an indemnity go without re-employment rights.

Chapter 5

Conclusions

It is apparent that at least in the three countries examined in some detail as well as in the United States the institutions of liberal capitalism and the development of an industrial society have produced great pressure from workers for some kind of job security. As we indicated in the introductory chapter, whether this attitude is accurately described as a sense of property in the job is merely a matter of terminology. It is clear that in all four societies workers have reacted against a system in which incumbency in employment rested at the will of the employer. In differing degrees institutions have developed which effectively removed some measure of this control from the employer.

In all four countries, present systems grew out of ones in which the employment relation was considered as essentially a contractual one, relating each individual employee to his employer by means of a contract of employment which was presumed to have been freely entered into and which was to be freely terminable by either party. No property or propertylike rights were created except as they might be embodied in the contract itself; and, such as they were, they ceased to exist upon the exercise of the right of either party to terminate the contract in accordance with its terms.

It is of some interest, perhaps, to note that complete formal equality in the contractual relationship was reached as late as about 1870—in the United States with the adoption of the post-Civil War amendments to the Constitution, in Britain with the passage of the Acts of 1867 and 1875, in France with the repeal of the discriminatory provisions of the original Civil Code in 1868, and in Mexico with the adoption of the 1870 Civil Code. But the achievement of formal equality turned out to be, not the attainment of a stable system, but a point in a continuing process whose next steps were the objectification of the notion of a job as something independent of a contract of employment, and a shift in control over, and equities in, the job.

For the purposes of this study we have taken the objectification of the job as given, and have not attempted either to define the concept carefully or to establish its existence. In the Introduction we noted some of the evidences in modern industrial practice and terminology. It seems clear that the concept of a job independent of a contract of employment or of incumbency in it is pervasive in an industrialized society.

In the preceding chapters we have been concerned with two aspects of control over jobs: (1) the extent to which the employer has lost control over incumbency in a job through loss of the right or power to terminate the employment relation at will when the job itself will continue to exist, and (2) the right of the employer to declare that jobs no longer exist by reason of market or technological reasons, and the right to allocate remaining jobs among existing employees, when a change in their number is determined. The first of these is the problem of disciplinary dismissal; the second, that of reductions in force.

DISCIPLINARY DISMISSALS

By about 1870 all four of the countries discussed had arrived at a classic liberal position so far as the law of employment relations was concerned. Each country had established formal contractual equality and symmetry between employer and employee. In general, the ordinary rules of contract governed the relation, with the one exception that because the person of the employee was involved, specific performance of the contract could not be obtained. Indeed, the attitude of the times was such that the right of the employer to rid himself of an unwanted employee was commonly considered just as worthy of protection as that of the employee not to be bound personally to an unwanted employment. At any rate, equal rights and obligations were imposed on the parties when termination of the contract was involved.

In such a system, the only issue raised by a disciplinary dismissal was that of notice or pay in lieu thereof. At contract law, breach gives to the aggrieved party the option of rescission; a disciplinary offense, if committed, was such a breach. If no disciplinary offense and hence no breach occurred, the employer still had the right to terminate the contract in accordance with its terms of notice, if any. In general, therefore, the employee was unable to raise any issue other than possible entitlement to pay in lieu of notice. No issue of continued right to employment or, generally, of damages for deprivation of such right could properly be raised.

In all four countries there has been at least some movement away from this system. In all four, a major industrial relations issue has been the establishment of a right of the employee to continued employment except as he may commit a disciplinary offense amounting to voluntary abandonment (or except as the job may disappear for economic or technological reasons). An important corollary of the establishment of this right has been the requirement that existence of good cause for discharge be proved by the employer. A second major issue has been the establishment of a remedy for improper dismissal.

The right has been most clearly established for those workers in the United States who work under the terms of a collective agreement, though Mexican workers have at least equal formal rights. Characteristically, for organized American workers, the agreement provides that they may not be dismissed except for just cause. This right, thus established, has become enforceable by legal process in the United States, either directly or by enforcement of an arbitration award based on the contract terms.

On the other hand, unorganized workers in the United States—and perhaps unorganized British workers—are, among those studied, the only workers who remain completely without any kind of established right to job tenure.[1] The establishment of this kind of equity in a job has been, in the United States, solely a function of collective bargaining, and its enforceability depends upon the special status to which the American collective bargaining agreement, in contrast to the British, has developed.

The law or custom as to the placing of the burden of proof of an act which amounts to abandonment of an equity in a job is important not only for its significance in the enforceability of the right, but as indicative of the establishment of the right itself. It indicates the nature of the presumption as to control over incumbency in the job. If, as in organized firms in the United States, it is assumed that the worker has committed no act that warrants his dismissal until proved otherwise, there appears to be a clear affirmation that the job belongs to the worker. The presumption is that it is his, and only affirmative proof by the employer can result in his separation for disciplinary reasons. No unilateral act of the employer, unaccompanied by proof, can deprive him of it. The control over continued possession rests in the hands of the employee, and the employer remains largely a bystander.

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[1] This, of course, excepts statutory protection against dismissal by reason of union activity or membership, or, in those states having Fair Employment Practices statutes, by reason of race, color, or creed.

Mexico has generalized by law the substantive right to continued employment contained in the typical American collective agreement. This right was established as fundamental to Mexican society by its inclusion in the Constitution of 1917; however, the detailing of its meaning and effectuation awaited the passage of the Federal Labor Law in 1931. The question of the remedy available to the worker who had been unlawfully deprived of his job remained an issue in controversy for more than thirty years, but the right itself was unquestioned. Not only was the employer forbidden to dismiss a worker without justification; it lay upon him to prove the existence of lawful cause for dismissal. Apart from remedies, then, the Mexican worker wherever he might be employed has formally possessed for more than thirty years those rights which collective bargaining has established for organized American workers.

It is difficult for a foreigner to discover, during a brief period of examination, the real-world meaningfulness of the Mexican worker's formally established rights. There can be little doubt that in substantial segments of the economy, where workers are not sufficiently literate to be well informed as to their rights and the means of their enforcement, or where unions are absent or insufficiently strong to be of real assistance to workers, the rights remain largely academic. Further, the corruption which admittedly and sadly is pervasive in Mexican industrial society undoubtedly results in subversion of legally established rights. Nevertheless, in visiting labor courts outside the metropolis as well as in it, one is impressed with the sense that here is an institution which, along with the law it is designed to enforce, has become deeply imbedded in the Mexican industrial culture. The rights established by the Federal Labor Law cannot be dismissed as mere paper rights which have no meaning. There can be no doubt that they have decided influence on Mexican employer-employee relations and that the extent of their influence is continually increasing.

France is the country which best illustrates how important the placing of the burden of proof is in the establishment of the right to continued employment. French practice, as we have noted, developed out of the legal doctrine that a right may be exercised abusively, in such fashion as to give rise to a claim for damages. Initially, the abuse consisted not in the exercise of the right, but in the intention with which it was exercised. The damage arose out of the malice. Thus, an employer had the right to dismiss a worker for any or no reason, so long as he did so without intention to injure the worker. And the burden of proving the illegal intention lay on the employee. Hence, in the early period, it was extremely rare that a dismissal was successfully questioned.

Two developments have gradually changed the meaning of this doctrine. One was the reversal of the burden of proof with respect to particular categories of workers—those who were ill or pregnant, then strikers, and then legally designated representatives of the workers. For these protected groups, the reversal of the burden of proof really meant an abandonment of the doctrine that the employer was limited only in the intent that lay behind his act of dismissal. It meant that, since he had to show valid cause for dismissal, these workers became endowed with a right to continuance in employment until they gave valid cause. There is a substantive difference between the situation in which dismissal is assumed to be lawful until malice can be shown, and that in which it is assumed to be unlawful unless good cause is established.

The second development has been the expansion of the meaning of *légèreté coupable*. It implies a shift from insistence upon proof of deliberate intention to do injury to the employee to an acceptance as well of the notion that the employee is entitled to protection from careless disregard of his interest. With the emphasis the courts have placed, via the doctrine of *légèreté coupable,* on the procedural adequacy of the act of dismissal, the substance of the worker's rights seems to be undergoing gradual change in his favor.

Obeisance is still paid to many of the time-hallowed doctrines: that the employer need give no reason to the worker for the dismissal, though the decree of the court must mention it and therefore the employer must allege some reason to the court; that the mere disproof of the existence of the cause given by the employer is not sufficient to establish the right to damages; that the burden of proving either malicious intent or culpable negligence rests on the employee. But when, in at least some types of cases, all this means is that the worker must show failure to adhere to contractual procedures, or that the decision was taken on the spur of the moment,[2] the law approaches in reality a shift in the meaningful burden of proof and, with it, a substantive change in the position of the employee. Entitlement to damages for abusive exercise of the right to dismiss becomes less and less exceptional, more and more the usual case for a worker dismissed without good cause. And inadequate as this protection may be, all rather than merely organized workers benefit from it. What protections there are have become embedded in the law and are growing; they do not depend upon a collective agreement.

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[2] See Brun and Galland, *Droit du Travail, Mise à Jour,* 1962 (Paris: Sirey, 1962), p. 101.

Britain is the most puzzling case from which to abstract reality from form. All that has happened, and one cannot but sense that it is much, lies outside the provisions of the law or even of enforceable agreement or of written statements of agreed principle. Formally, control over the job remains with the employer. Provided he meets the terms of notice, he may dismiss with or without cause. Not only do no laws or agreements question this, the formal statements of trade-union leadership seem to confirm it. Procedure agreements are open to the worker, supported by his union, in the event of allegation of inequitable dismissal, but the plea must be addressed to equity, not right. And the procedure agreements are ill-suited to this kind of dispute. Unlike the American grievance procedure, they are particularly designed to handle disputes over interest, and are not basically intended to protect individual rights.

The preoccupation of British trade-union leaders with problems of full employment and their neglect of plant-level problems of the employed worker have left a power vacuum into which shop stewards have stepped. It is evident that however little formal recognition it may have, a sense of equity in particular jobs is strongly held by employees. Consequently, an act of the employer which violates this sense of equity provokes a reaction among British workers which shop stewards support. There is no doubt whatever that many British employers are forced in reality to accept the notion that workers cannot be dismissed except for good cause. And the absence of a formal procedure to test the existence and adequacy of the cause may make it even more difficult for them than for their American counterparts to establish and maintain standards of industrial discipline, or to dismiss when good cause in fact can be shown.

The nature and the adequacy of the remedy, once the right is established, are revealing of both the reality of the right and the social concept of it. The key issue here is that of reinstatement. If and when a right to continued employment is established, that right becomes fully effective only if the worker is entitled to be restored to his position when improperly removed from it. Only when the employer cannot buy back control over incumbency in the job by the payment of damages has the worker gained complete and effective possession.

The common traditions of liberalism and the maxims of contract law in the four countries placed on the same plane the essential liberty of the employee not to be required to work involuntarily and that of the employer not to be required to continue a particular employee in his employ. The French use the same phrase, "to resume one's liberty," in talking about the act of dismissal and the act of quitting. Even as the basic differences between these two "liberties" became apparent in an industrialized and corporate society, the principles of symmetry and reciprocity led always to the conclusion that if the employee could not be required to continue to work, as obviously he could not, then it followed that the employer could not be required to continue to offer him employment.

Only in the United States did this problem fail to produce extended controversy. This was probably because where rights were established in the United States, with the exception of the NLRA and the Fair Employment Practices statutes, it was done by agreement between the parties to collective agreements. Further, the remedies were established in large part by arbitrators voluntarily selected by the parties and less likely to adhere rigidly to formal principles of the law. Under such circumstances, no great conflicts were aroused when workers dismissed without proper cause were ordered reinstated. And, as most employers voluntarily accepted these decisions, it was not difficult for the courts, in the rare cases in which they were required to enforce the collective contractual right directly or by enforcement of an arbitration award, to find ways in which ancient maxims could be got around.

Mexico is particularly interesting in illustrating the vitality of traditional principles of civil law in a society in which a revolution specifically disavowed them. Opinion will, no doubt, remain divided as to what was intended in the apparent conflict between the relevant sections of Article 123 of the Constitution of 1917. But it is of interest to note that the courts, with only a brief hiatus, held for forty-five years to the position that they could not enforce the obligation on the employer to accept reinstatement of an employee. The legal position is now clarified, though it remains to be seen how the exceptions will be construed and how the law will be applied in the day-to-day life of Mexican industry. It is not clear that most Mexican workers are ready to accept the remedy of reinstatement. The fear of employer retaliation is still strong, and the temptation of a large lump sum in damages is great. But the principle at least is established.

French law and industrial culture are still dominated by the notion that reinstatement is an unacceptable remedy. With the passage of recent legislation, the illegally dismissed worker representative remains in a kind of limbo—reinstated yet not, possessing a valid contract of employment but not compulsorily admissible to his place of work for any purpose other than performance of his official, as distinct from his employee, function.[a] It seems incredible that such a situation can last. And the passage of the law establishing minimum legal periods of notice for workers gives some evidence that French lawmakers are increasingly willing to put aside the formal doctrines of the classic Civil Code. To use the words of the reporter for the Parliamentary Commission, whose views prevailed at least in principle, reciprocity is a relic of an earlier era.

But still, in France, the remedy for all but the worker representative is only damages. The lengthened period of notice doubtless provides some deterrent to casual dismissals, for failure to give notice requires proof of good cause on the part of the employer. But for abusive dismissal, also, the only remedy is damages, and, except for white-collar and professional workers, the amounts are not often a strong deterrent, though when added to pay in lieu of notice they have become of more consequence.

Social pressures to assure the French worker of security against unjust dismissal have been apparent at least since the end of the nineteenth century. Change in this direction has been slow but constant. But the final assurance, the right to reinstatement, still remains generally outside the French concept of an appropriate remedy.

In Britain, of course, since there is no formal right there is no formal remedy. As has been indicated, occasional cases enter procedures established by collective agreement, but in these the right of the employer to dismiss is not questioned. Only the obligation to give notice or pay in lieu may be established. But extra-agreement action by workers collectively in defense of the right of fellow employees to remain employed is frequent, and not infrequently results in forced reinstatement of the employee. There is clear evidence that the British worker regards this as the appropriate remedy for interference with a right which he apparently regards as his, no matter its lack of formal recognition.

Judging, then, by the institutions which have grown gradually to protect it in each of the four countries, in each there exists among workers a strong sense of proprietorship in the particular jobs which they occupy. These institutions are farthest advanced in organized industry in the United States and, with the recent legislative changes, for workers generally in Mexico. It remains to be seen in the latter how effective the provision for reinstatement will be. France seems to be moving away from the conventional principles of contract which have symbolized the conflict between the institutions of a liberal society and the growing sense of job equities. In Britain, informal pressures have expressed and enforced the need for security. The change, then, is taking place in ways adapted to the institutions of each country, but the direction seems the same—toward the establishment of the same rights and, at a more uneven pace, toward the same remedy, that of reinstatement.

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[a] It has been noted that the Criminal Chamber, though not the Social Chamber, of the French Supreme Court has recently moved toward a more realistic position.

Reductions in Force

The problem of expression of the sense of equity in a job becomes more complex when the issue is the possible disappearance of jobs as a result of market or technological change. Few workers are so unrealistic as those in Britain, led by the extreme left, who oppose on principle all reductions in the number of jobs in a particular enterprise. It is obvious that in a dynamic society jobs must be redistributed among enterprises and occupations. Given the observed sense of equity in existing jobs, such questions arise as: (1) where is the locus of decision as to whether jobs must be destroyed; (2) who is to decide whether there are feasible alternatives, in the face of a recognized reduction in work or elimination of jobs or particular job rights, and where is the locus of choice; (3) what shall be the ordering of claims to remaining jobs, and who determines it; (4) are there residual rights for separated workers; and (5) is there a claim to compensation for disappearing jobs?

In all four countries, the unilateral right of management to reduce forces no longer is unquestioned. The growing insistence of workers on participation in this decision, or in the choice of some alternative to layoffs, is persuasive evidence that they feel some kind of ownership in their jobs and that this right is expressible when situations of economic difficulty or technological change threaten their employment.

In the United States employee participation in these decisions takes place, if at all, through the processes of collective bargaining. The Hawthorne experiments and Stanley Mathewson's research[4] indicate clearly, of course, the endemic sense among American workers of a claim to protection against loss of jobs, enforced by informal sanctions. But effective and organized efforts to participate in the crucial decisions depend upon collective bargaining.

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[4] See F. J. Roethlisberger and W. J. Dickson, *Management and the Worker* (Cambridge: Harvard University Press, 1949); S. B. Mathewson, *Restriction of Output among Unorganized Workers* (New York: Viking, 1931).

It is well established that mitigating the impact of reductions in force, for whatever reasons, is an appropriate subject for bargaining. And, as we have observed in the Introduction, the collectively bargained devices which result from this participation in the process of decision-making are of almost infinite variety. Rarely is the ultimate and long-term right of management to reduce the number of jobs questioned where economic circumstances are involved, and even as to technological change the policy of sheer obstruction is rare. But there is continued and growing insistence on the right to regulate the rate of change, on the choice of work-sharing alternatives, and above all on the establishment of rules to order worker claims.

In Mexico, worker participation in the crucial decisions through trade unions is an effective result of the law which regulates the conditions of reductions in force. Management must obtain permission to reduce forces, and request for such permission may become an adversary proceeding, with the trade union representing the negative. Under these pressures many Mexican plant or industry agreements require consultation with the union before undertaking reductions in force, and provide alternatives. Again, the collective agreement, as well as the law, provides for the ordering of claims to continued employment. However, as we have noted, important escapes from the rigidity of the legal and bargained rules lie in the abuse of the right to employ casual or temporary workers.

In France, worker participation is both most highly formalized and possibly least effective. Employers are required to consult with works councils before taking such decisions, and to obtain permission from the Labor Inspector, before whom worker representatives may make representations. But they retain the ultimate and absolute right to make the decision to terminate workers,[5] and the terminations become effective even though permission to reduce is not obtained. Failure to abide by the regulatory decision carries criminal penalties, but has no effect on the dismissals. Further, the criteria upon which permission is to be based rest on public questions of the orderliness of the labor market rather than on regard for worker rights. To be sure, the tone of the most recent circular of the Ministry of Labor shifts this emphasis somewhat. And a few collective agreements give the union significant rights in the choice of alternatives. But at least to this point, worker consultation with respect to reductions in force has been largely a bothersome formality for the employer rather than any significant loss of control.

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[5] The Brinon case represents an effort at maximum penetration of the right to manage in its questioning of a reduction on the ground of managerial inefficiency. It failed, however.

The same can be said about worker participation in determining priorities of claims to continued employment. Again the law requires consultation at two points: first, in the establishment of the plant rules which must establish criteria for reductions in force, taking into account the requirements of the law as to seniority, capacity, and responsibility for dependents; and, second, at the actual moment of reductions when a specific list is drawn. But realistically, little influence seems to be exercised at either point. Most plant rules simply reiterate the legal criteria without impairing management's right to assign weights to them. Inspectors may succeed in altering lists at the time of dismissal, sometimes with the assistance of the works council or under pressure from it or the union, but such influence is probably minor and affects only unusual individual cases. In general, workers have succeeded in gaining little control over the crucial decisions involved in reductions in force.

Britain again represents the most difficult case to interpret. The general principle of joint consultation is, of course, well accepted in British industry. But, on questions of redundancies, the extreme of British management opinion which insists on complete retention of sole managerial discretion in these matters is matched by the extreme of trade-union opinion which is equally insistent on the policy that there shall be no redundancies. Between these, however, there is a large segment of British industry in which consultative procedures work with greater or lesser effectiveness to give shop stewards and trade-union officialdom some voice. Consultation is undoubtedly much more effective in the decision as to order of separation than in the taking of the original decision and the consideration of alternatives. The latter remains the cause of great conflict in British industry, the former less so, perhaps because of the absence of firm pre-established rules, so that in the process of consultation the union representative is placed in the difficult position of choosing which of his constituents shall retain jobs, and which shall lose them.

The establishment of more or less fixed rules or practices governing priorities of claims among workers to continued employment is also evidence of a shift in the locus of control over incumbency in jobs. The ubiquity of seniority as at least one among several criteria is indicative of the view that incumbency over long periods of time endows the worker with prior rights. In each of the four countries seniority is recognized as an appropriate criterion of selection. Its relative significance is greatest in Mexico, though there the conversion of a reduction in force into a collection of individual dismissals, for which the legal indemnity for discharge without good cause is paid, has until recently provided management with a possible escape from the seniority rule. It remains to be seen what the impact of the new right to reinstatement will have on this practice.

Among its numerous applications, seniority in layoffs ranks relatively high in American trade-union views. Collective bargaining over layoffs and reductions in force almost invariably involves, as one element, conflict and compromise between the union objective of rigid insistence upon seniority as the guiding principle and the management objective of unilateral discretion to choose on the basis of maximum productive usefulness. Even where the seniority principle is diluted by the criterion of capacity, many agreements modify the right of management unilaterally to adjudge relative capacity by making its judgment subject to review in the grievance procedure.

In Britain, seniority again is one of the informal rules which pervade British industry. Its acceptance by unions or by management is undoubtedly not as general in Britain as it is in the United States. As in France, it is modified typically by two other criteria, the familiar one of merit and ability and that of family responsibility. The latter, of course, is extremely rare in American practice. The major difference between France and Britain is the degree of freedom available to management in applying the criteria.

The application of criteria of financial need in both France and Britain is of considerable interest, representing as it does a modification of job-related criteria of seniority and ability by a welfare standard. Though, insofar as it is enforceable, it represents a removal of managerial control and discretion, it clearly differs in kind from those criteria which are purely job or employment centered. In this respect remaining jobs are allocated in these two countries on bases other than the establishment of propertylike equities.

The establishment of re-employment rights for workers separated in a reduction in force is also evidence of the development of proprietorship in employment in the United States. Such rights are general in organized industry. They give to laid-off employees a right to employment in such jobs as may again require filling, usually in an order determined by the same criteria as those in accordance with which they were laid off. In such a system, a kind of employment relation continues beyond the point at which actual rendition of service ceases. The propertylike relation to the job exists, though the need for an incumbent in the job may temporarily have disappeared.

In Mexico, again, the law provides for re-employment rights for workers whose employment relation is suspended for economic reasons. This right is often affirmed by collective agreement and enforced by the union, which dispatches workers under closed-shop contracts. However, under some agreements, the employer may buy out the obligation to give re-employment priority if the worker is willing to accept the legal or collectively bargained indemnity, in legal effect converting an economic into an individual dismissal.

French collective agreements commonly provide for re-employment rights. These are enforced, however, only in that the employer is required to notify the Inspector of Labor when openings occur; the Inspector then should refer former workers. Though the employer is morally obligated to accept them, he cannot be required to by force of law. This is one other remnant of the contractual view of employment relations. Since mutual rights and obligations flow from contracts, enforceable rights are not conceived to continue once the contractual relation has ceased. The only enforceable exception is in the case of ex-employees returning from military service.

Similarly, in Britain, though occasional agreements provide in principle for re-employment priorities, they are unenforceable both because they are incorporated in collective agreements which have only moral force and because of the continuance of an essentially contractual view of the employment relation. Further, in this area, where actuality departs from the form it does so largely for the convenience of the employer rather than under effective collective pressures of workers. Indeed, as has been observed, British employers often use the occasion of layoffs to rid themselves of unwanted workers who had been protected by the fear of collective reaction to discipline. Certainly no intention exists to restore such persons to employment after a layoff.

Finally, the practice of severance allowances may indicate some expression of the accumulation of a propertylike equity in employment which entitles the worker to a form of liquidated damages upon the destruction of his job. Alternatively, severance pay may be an expression of paternalistic concern for the welfare of less privileged persons to whom the employer owes a special kind of quasi-charitable obligation. It is not always easy to disentangle these two approaches.

The case of Mexico expresses perhaps most clearly a general social acceptance of the liquidated damage approach to severance pay. In all instances of displacement by new machinery or processes, the law itself requires the payment of an indemnity whose amount is fixed by law and rises with length of service. In the case of reductions in force for nontechnological reasons, though the law permits collective dismissals after proof of lawful cause, the procedure is so cumbersome that practice and collective agreement have established severance pay as the more usual alternative, at least among the larger employers.

In Britain, severance pay arrangements have become increasingly common. Where they are negotiated *ad hoc* under pressure at the time of a reduction in force, they can reasonably be construed as a form of liquidated damages. On the other hand, in many large firms, the announced policy of *ex gratia* payments in amounts to be fixed individually at the time of separation expresses the traditional paternalism of many British employers, rather than any employee right to compensation for destruction of equities. The intention here is often merely to tide the worker over between jobs as a matter of *noblesse oblige*.[6]

In Britain, the Contracts of Employment Act has at least a tangential relationship to this issue, since some regard it as, in effect, a device to give minimum severance pay allowances in the form of pay in lieu of notice to long-service workers. Indeed, an alternative proposal would have done this specifically. Despite its mixture of motives, it represents evidence of a change in social attitude toward the employer-job-employee system of relationships.

In France, the practice of severance payments for manual workers is one of the more important recent developments in collective bargaining. Such payments have become widespread in industry covered by collective contract. This is one of the few areas in which collective bargaining has proceeded far without the law following close behind. These agreements, and the several forms of work sharing that often accompany them, seem really to evidence a vesting of an equity in employees, whatever may be the reason for reductions in force.

The 1958 French and the 1963 British notice laws are of particular significance, not only because they provide a possibility of additional severance allowance, but especially because they both represent real breaches in the formal doctrine of contractual reciprocity.

In the United States, the severance pay solution is possibly least far advanced as among the four countries. Severance pay schemes are relatively rare, and are often limited to cases of technological displacement or plant removals and closures. This may, however, be consistent with the more widespread practice in the United States of enforceable rights to re-employment. In many plans in the other countries, where re-employment rights are not consistent with general practice, severance pay is conceived of as an alternative to them. Logically, they may be looked on as alternatives, since severance pay may be regarded as a complete settlement against job claims. Supplemental unemployment benefits are a form of employer obligation more consistent with the rest of American practice than is a payoff for complete severance of the relationship.

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[6] It should also be noted that severance payments made under an agreement that is a condition of employment are subject to income tax, while *ex gratia* payments are not. This fact may have deterred some unions from pressing for formal agreements.

In any event, American unions have been more concerned with the establishment of continuing rights and with control of the rate of job loss than with the negotiation of severance pay. The latter has been almost wholly confined to the case in which the job can never be expected to reappear, at least in the same form, and is still rare even in such cases.

SUMMARY

The evidence of these four countries tends to support the conclusion that the classic liberal contractual approach to the employment relation in a complex industrial society is simply not a viable one. Workers do in fact tend to regard themselves as having some kind of right of possession in a job, and to devise institutions which wrest control over incumbency from the hands of the employer and which express objectively a vesting of propertylike rights in the worker.

The devices by which this trend is expressed and the rate of change vary, of course, from country to country, depending upon its culture and institutions. In the United States, it is expressed primarily through the device of the collective agreement, and it may be farthest advanced in those jobs in the United States in which collective bargaining determines the basic character of the relationship of workers and employers to jobs. On the other hand, it is undoubtedly least far advanced in the unorganized segments of American industry, in which little has changed, so far as job control is concerned, since 1870.

In France and Mexico, the primary device is that of the law, though in Mexico particularly and to a lesser extent in France legal expressions of propertylike rights in employment are supplemented by collective agreement and effectuated with the assistance of trade unions and, in France, the institutions of the legally required worker representatives. In Mexico protection is general and far advanced; in France the rate of change has been much slower. There, the doctrines of the classic civil law have, in fact as well as in law, shown great persistence. This may be because of the traditional insistence of French worker organizations on revolutionary change and, at least until recently, their dogmatic rejection of ameliorative policies. Even at the plant level, the French worker still often fights against the employer rather than for the achievement of a short-range objective. Such an "all or nothing" strategy is likely to get little, and seems thus far to hold little promise of getting all. Nevertheless, as the chapter on France indicates, change has occurred in the direction of removal of absolute employer control over jobs, and virtually all of that change gives rights to workers whether organized or not.

In Britain, the formal institutions of law and the collective agreement are not the primary devices through which job security is enhanced, though some collective agreements express certain elements of change in the network of relationships. The Contracts of Employment Act represents the first major legal expression since 1875 of a change in social attitude toward the nature of the employer-employee relationship. This, of course, does not consider legislation dealing with trade-union rights, which are generally not relevant to our problem except as they may give workers collectively more power to enforce informal codes.

But behavior at the place of work does not always follow the formal rules of law, nor are employers always effectively able to exercise the rights which they legally possess and which, indeed, many trade-union officials grant to them. Pressures from workers result in the development of informal codes which employers are required to adhere to or which attain acceptance over time. The frequency of overt conflict over rights as workers and employers see them is, however, evidence that accommodation is still not general.

The most difficult problem remaining from the concepts of the nineteenth century is that of reinstatement rights. Once established, the right to reinstatement represents the ultimate loss of employer control and the final symbol of worker ownership of a post of employment. Reinstatement as a remedy for improper dismissal was most easily accepted in the United States, perhaps because of the form in which it was achieved—by way of a collective agreement which could reasonably be construed as a voluntary waiver by the employer of his common-law right. But, again, in the United States this left the second world of unorganized employment in the past. Even in revolutionary Mexico it took forty-five years of formal rejection of the concepts of liberalism before this logical conclusion of rights expressed in the 1917 Constitution could be effectuated. France has marched to the brink, at least with respect to the rights of worker representatives, only to recoil at legally forced readmission of an unwanted employee to his post of work.[7] In Britain, collective action of workers sometimes forces reinstatement, though it is not established as a matter of right.

Arguments on the illogic of various institutional expressions of a propertylike view of jobs[8] are largely irrelevant. While it may be true that a market system may, and even in some ways does, differentiate risks so as to distribute rewards in forms other than title to employment, or that job-security practices result in resource allocations different from and economically less efficient than those which would result otherwise, workers in the societies studied do not seem content to rely upon the market as provision against insecurity. And the pressures they are able to generate build devices which remove job control from employers and give to workers a control resembling that of a property owner over his property. In each of the countries studied, through different institutions but, all things considered, by remarkably similar devices, this seems to be a consistent direction of social change.

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[7] See my "Réintégration des Salariés selon le Droit Français et le Droit Américain," *Droit Social*, April 1962.

[8] See Simon Rottenberg, "Property in Work," *Industrial and Labor Relations Review*, 15 (April 1962), 402. Rottenberg's argument is directed against severance pay.

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